OPINIONS BELOW

The original opinion of the Court of Appeals for the Ninth Circuit is reported at 395 F.3d 1114. The order modifying the original opinion and denying the petition for *en banc* review is reported at 402 F.3d 875. The order and the opinion as modified appear in App. A at 1a-25a. The decision of the District Court is unreported and appears at App. B. at 26a-50a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 26, 2005. The order denying the petition for rehearing *en banc* was entered on April 1, 2005. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

La Habra Ordinance 1626 appears in full at App. C at 51a-75a.

Section 4 of Ordinance 1626 (App. C at 67a) provides in part:

> "*Adult Cabaret Dancer*" shall mean any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting

> [sic] or engaging [sic] in "specified sexual activities." Adult cabaret dancer does not include a patron.

Section 7(F) of the ordinance (App. C at 71a) provides:

> As to off stage performances, no performer shall perform adult live entertainment characterized by the exposure of specified anatomical areas or engaging in specified sexual activities off stage. As to an adult cabaret dancer then performing off stage, a distance of at least two feet (2') shall be maintained between the adult cabaret dancer and patron(s) at all times. As to off stage performances, no adult cabaret dancer shall have physical contact with any patron and no patron shall have physical contact with any adult cabaret dancer, while the adult cabaret dancer is performing on the premises. This prohibition does not extend to incidental touching.

Section 7(G) of the ordinance (App. C at 71a) provides in part:

> In addition, while on the premises, no performer or adult cabaret dancer shall have physical contact with a patron and no patron shall have physical contact with a performer or adult cabaret dancer, which physical contact involves the touching of the clothed or unclothed genitals, pubic area, buttocks, cleft of the buttocks, perineum, anal region, or female breast with any part or area of any other person's body either before or after any live entertainment by such performer or adult cabaret dancer.

STATEMENT OF THE CASE

1. Introduction

Petitioner Bill Badi Gammoh operates the Taboo Gentlemen's Club, a licensed adult theater in respondent City of La Habra, California ("the City"). (ER 557, 663.) The other petitioners are performers at the club (ER 63-64), except for petitioner Stacy Joy Andre, who has been offered a position as a dancer at the club but has not yet accepted it for fear of

enforcement of the ordinance at issue in this case. (ER 600-602.) This petition refers to petitioners collectively as "Gammoh."

The club offers on-stage nude and semi-nude solo dancing, and off-stage clothed performances for individual patrons. (ER 555-56.) However, unlike most of the adult-entertainment cases previously addressed by this Court and other courts, this case only raises issues concerning the regulation of *clothed* dancers who perform in an alcohol-free environment and who do not have intentional physical contact with customers.

While off stage, the performers always wear clothing that opaquely covers their "specified anatomical areas" (*i.e.*, genitalia, buttocks, and breasts). (ER 588, 594, 605-606, 664-65, 742-43, 758.) This clothing typically consists of pants, dresses, skirts, gowns, tank tops, and bikinis. (ER 586-88, 620, 642, 667, 712, 741-42.) These costumes "are perfectly acceptable in modern society and fail to raise eyebrows or alert the police," even when worn in public. *Vaughn v. St. Helena Parish Police Jury*, 192 F. Supp. 2d 562, 573 (M.D. La. 2001).

2. La Habra Ordinance 1626

On April 7, 2003, the City enacted Ordinance 1626, which regulates the operation of adult businesses. Section 4 defines the term *adult cabaret dancer*. Section 7(F) requires adult cabaret dancers to maintain a distance of two feet from patrons while "performing." At other times, § 7(G) allows adult cabaret dancers to have as much proximity and physical contact with patrons as they choose, so long as the patrons do not touch the dancers' breasts, buttocks, or genital areas.

Gammoh challenges the definition of "adult cabaret dancer" in § 4, and the prohibition against proximity during performances imposed by § 7(F). He does not challenge the prohibition against physical contact, because even when the dancers at his club are not performing, they engage in no physical contact with patrons other than "incidental touching," such as a handshake or a momentary hug. (ER 585-86, 609-610, 612-614, 622, 635-36, 643-46, 649, 650, 654-55, 660-61, 664-65, 671-74, 688-89, 713-14, 716, 720-21, 723, 746-48, 753.) This

"incidental touching" is expressly permitted by § 7(F), and the City has conceded its legality. (ER 28.)

Clifford McPhail, the La Habra police official in charge of enforcing Ordinance 1626, testified as follows regarding the definition of "adult cabaret dancer:"

- The definition is "very subjective" and "difficult." (ER 810.)
- The element of "a 'sexually-oriented dancer' is in the eye of the beholder" and subject to "a wide range of interpretation." (ER 810-11.)
- Satisfaction of the element of "a performance on a regular basis" is "based on the ability of someone to . . . either predict or reasonably expect . . . what the performer's going to do." (ER 818-19.)
- The element of "focusing" could be satisfied "either with what the dancer does or what the [observer] perceives." (ER 829.)

Although different officers "would have a wide range of interpretation," McPhail was confident of his ability to determine whether a performer is an adult cabaret dancer. (ER 811, 815-16.)

The City has provided McPhail and its other officers with no training or guidance regarding the interpretation or application of any of the terms of the definition. (ER 811-12, 819, 835.)

Section 1 of the ordinance contains findings that adult uses in general cause adverse secondary effects of crime, economic harm, and the spread of sexually-transmitted diseases. (App. C at 51a-66a.) The City purported to have reached these conclusions on the basis of seventeen studies concerning the effects of nude entertainment and the sale of explicit sexual material in other jurisdictions. *Id.*, § 1(C) (App. C at 52a-53a.) None of these studies involved the effects of clothed entertainment in alcohol-free environments. (ER 220.)

Gammoh presented an uncontradicted study by Dr. Daniel Linz, a noted expert in the field of secondary effects caused by adult businesses, analyzing detailed statistics compiled by the La Habra Police Department regarding crime within the City of La Habra itself. These statistics proved that in La Habra, crime is far more likely to occur in the vicinity of a typical bar serving alcohol than near an adult club.[1] (ER 517-527J.) The City did not consider this information in enacting the ordinance.

Gammoh also presented extensive testimony from the dancers, and expert opinion from Dr. Judith Hanna, an anthropologist of dance, explaining that the most important aspect of the dancers' offstage performances is not their "sexual orientation," their degree of "focus or emphasis" on particular body parts, or any of the other elusive concepts in the definition. Rather, the critical element of the performances is the dancer's *proximity to the patron*. (ER 242-43, 504, 506-510, 535-40, 557, 608-609, 625-26, 647-48, 697.) Despite what one might imagine based upon stereotypical notions of adult clubs in general, or the actual practices in clubs involving offstage nudity and fondling, the primary interest of patrons engaging with clothed dancers for off-stage performances is not to ogle the dancers, but to converse with them. (ER 607-608, 646-47, 715-16.) These conversations are not overtly sexual in their content. (ER 625, 646-47, 716-17.)

Dr. Hanna explained the importance of these conversations and the need for them to occur at an intimate distance:

> A romantic relationship in American culture commonly includes a dinner or nightclub date with the pair seated proximate and touching as a metaphoric sign of attraction and Eros. Consequently, in dance, the performer is similarly close to the patron to evolve a fantasy of romance. The proximity permits normal conversation and erotic whispering over the

[1] Under California law, clubs featuring nude entertainment may not serve alcohol. 4 California Code of Regulations § 143.3(1)(c).

> sound of loud music. . . . The dancer talks about the patron being special. They make eye contact and become co-creators of fantasy.

(ER 537.)

3. Proceedings Below

On April 28, 2003, Gammoh filed this action in the Superior Court of California for Orange County, asserting that §§ 4 and 7(F) of the ordinance are unconstitutional. On June 2, 2003, the City removed the case to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1441(b). Gammoh thereupon filed an amended complaint.

The City moved to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). In an order entered on October 9, 2003, the District Court (Gary L. Taylor, D.J.) dismissed Gammoh's claims of overbreadth and violations of due process and equal protection and part of his vagueness claim without leave to amend, and dismissed Gammoh's claims of vagueness, vested rights, prior existing use, and equitable estoppel with leave to amend. It denied the motion as to Gammoh's claims of violation of free speech and expression and facial violation of the Takings Clause.

Gammoh filed a second amended complaint, which the City moved to dismiss under Rule 12(b)(6). In an order entered on December 16, 2003, the District Court dismissed Gammoh's claim of prior existing use, and otherwise denied the motion.

In a judgment entered on June 2, 2004, the District Court granted the City's motion for summary judgment on all of Gammoh's remaining claims: vagueness, free speech and expression, taking, vested rights, and equitable estoppel. (App. B at 26a-50a.)

In a judgment entered on January 25, 2005, the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court. In an order entered on April 1, 2005, the Court of Appeals modified its earlier opinion in minor respects and denied petitioners' petition for rehearing *en banc*. (App. A at 1a-25a.)

REASONS FOR GRANTING THE PETITION

As evidenced by the number of recent judicial decisions on the subject,[2] the regulation of clothed adult entertainment is among the most contested and quickly-evolving areas of contemporary First Amendment jurisprudence. Entertainers and club owners, as well as the municipalities that regulate them, need clear and consistent constitutional principles for defining regulated clothed conduct and determining which activities are likely to cause adverse secondary effects and which are not. The decision of the Court of Appeals impedes these goals in two ways.

First, the decision is contrary to many prior rulings recognizing that principles governing nude entertainment and the sale of sexually-explicit merchandise are inapplicable, in multiple respects, to clothed no-contact dancing, even when it occurs in an "adult" club. These principles involve issues raised in this petition concerning the specificity with which regulated clothed performances must be defined, the degree to which the movements of clothed dancers can be regulated at all, and the quality of evidence necessary to justify or challenge those restrictions.

Second, the ambiguous, ill-founded ordinance upheld by the Court of Appeals is likely to serve as a model for many municipalities, both within the Ninth Circuit and elsewhere. The scope of this ordinance is more restrictive of First Amendment rights than corresponding ordinances annulled by other Courts of Appeals, and the type of evidence underlying it has been held insufficient as a matter of law by other Courts of Appeals. Nevertheless, large numbers of

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[2] *E.g., R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 404 (7th Cir. 2004); *Jake's, Ltd. v. City of Coates*, 356 F.3d 896, 903 (8th Cir. 2004); *Ward v. County of Orange*, 217 F.3d 1350, 1352 (11th Cir. 2000); *MDK, Inc. v. Village of Grafton*, 345 F. Supp. 2d 952, 958-59 (E.D. Wisc. 2004); *Nightlife Partners v. City of Beverly Hills*, 304 F. Supp. 2d 1208, 1212, 1217 (C.D. Cal. 2004); *Diva's, Inc. v. City of Bangor*, 176 F. Supp. 2d 30, 35-37 (D. Me. 2001); *Vaughn v. St. Helena Parish Police Jury, supra*, 192 F.Supp.2d at 572-73; *Score LLC v. City of Shoreline*, 319 F. Supp. 2d 1224, 1235 (W.D. Wash. 2004); *Furfaro v. City of Seattle*, 144 Wash.2d 363, 367, 27 P.3d 1160, 1162 (2001); *Boyd v. County of Henrico*, 42 Va.App. 495, 523, 592 S.E.2d 768, 782 (2004).

municipalities are virtually certain to adopt identical or similar restrictions, precluding broad categories of innocuous performances, even in the face of pre-enactment proof that the performances cause no harm. For example, the City of Los Angeles is considering the adoption of a similar ordinance, and La Habra's counsel has urged "all jurisdictions" to do the same.[3]

Moreover, from any point of view, clothed no-contact dancing is more benign than the nude dancing and fondling typically encountered in adult-entertainment cases. While a distance requirement may be of little communicative consequence when the "entertainment" consists of no more than a crude display of anatomy, it profoundly impedes the experience of intimate conversation that makes a patron choose a clothed dancer over her nude counterpart. Regulations like the one at issue here, however well-intended, have as their primary effect the encouragement of coarser forms of entertainment, which are far more likely to cause adverse secondary effects than is a dancer in a bikini whispering into the ear of a patron. Indeed, the Seventh Circuit has recognized in this context that "more explicit and erotic content is commonly available on primetime television without being fairly regarded as adult entertainment." *Schultz v. City of Cumberland*, 228 F.3d 831, 847 (7th Cir. 2000).

Because "adult entertainment" ranges "from the modestly titillating to the hardest-core," *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853 (1997), Circuit Courts and District Courts often have articulated the necessity of more clarity from this Court in resolving challenges to adult-use restrictions, particularly when the entertainment is not sexually explicit.

In *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004), the Seventh Circuit repeatedly expressed the need for additional guidance from this Court regarding multiple issues arising out of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), including a municipality's burden of justifying a

[3] David Haldane, "Court Upholds La Habra's Ban Against Lap Dancing," *Los Angeles Times* (January 27, 2005), http://www.zbone.com/zone/p-news05.htm.

restraint on mainstream speech, and the degree of sexuality that must be involved for *Alameda Books* to apply at all:

> [I]t is unclear how 'sexual' in nature regulated speech must be to warrant the *Renton/Alameda Books* analysis. . . .

R.V.S., supra, 361 F.3d at 414.

> Without further direction from the Supreme Court, we cannot constitutionally lower the already modest evidentiary hurdle for justifying regulations of sexually explicit but non-obscene speech on secondary effects grounds, especially in a case where mainstream speech is affected.

Id. at 415-16.

Other courts have expressed similar concerns. For example:

> The Court is uncertain to what extent the Supreme Court would advocate that we simply approve the State's reliance on "propositions . . . well established in common experience and . . . zoning policies that we have already examined," *Alameda Books*, 535 U.S. at 453, and ignore the implications of more persuasive, if counterintuitive, evidence like Dr. Linz's study. Clearer guidance in this area would greatly aid the Court in determining whether the club owners have established a strong likelihood of success on a claim that no restriction on nudity could possibly further the State's interest in reducing secondary effects.

J.L. Spoons, Inc. v. Morckel, 314 F. Supp. 2d 746, 756-57 (N.D. Ohio 2004) (ellipses in original).

Even the Court of Appeals in this case recognized that the principles governing explicit adult entertainment may not be entirely applicable to clothed dancing: "There is certainly a point along the continuum where suggestive speech no longer falls within the 'sexual or pornographic'" category, and "this case pushes us closer to that point than those cases where performers are nude or topless." (App. A at 15a.)

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS PRECLUDING, ON GROUNDS OF VAGUENESS AND OVERBREADTH, THE REGULATION OF CLOTHED DANCES IN GENERAL TERMS RELATING TO THE UNDEFINED "SEXUAL ORIENTATION" AND "FOCUS" OF THE DANCERS' MOVEMENTS.

A. Vagueness

A restriction is unconstitutionally vague if it is not written with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). When First Amendment interests are involved, even greater specificity is required. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

Section 4 of Ordinance 1626 defines *adult cabaret dancer* as follows (with the challenged phrases underlined):

> "*Adult Cabaret Dancer*" shall mean any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting [sic] or engaging [sic] in "specified sexual activities." Adult cabaret dancer does not include a patron.

This definition is unconstitutionally vague on both grounds stated above: ordinary people cannot understand what conduct makes a person an "adult cabaret dancer," and the definition encourages arbitrary and discriminatory enforcement. The testimony of the City's chief enforcement officer recounted above proves both points. *See Village of*

Hoffman Estates, supra, 455 U.S. at 503 ("Testimony of . . . the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the 'judgment' of police officers to give meaning to the ordinance and to enforce it fairly").

A dancer in La Habra must construe all of the following elements in the *absence* of "specified sexual activities" and of displays of "specified anatomical areas:" (1) a "sexually-oriented," "exotic," or "similar" dance, (2) performed "on a regular . . . basis," (3) performed on a "substantial basis," and (4) "focus[ing] on or emphasiz[ing her] breasts, genitals, and or buttocks."

The Court of Appeals recognized that these phrases "are unarguably subjective." (App. A at 6a.) Nevertheless, the Court concluded that the definition as a whole is constitutional because of two factors. Neither of these factors has support in prior case law, and both conflict with established constitutional doctrine.

First, the Court noted that the various subjective elements of the definition "provide[] context in which the other limitations may be clearly understood." (App. A at 7a.) However, each element of the definition must be construed to have its own significant meaning apart from the others. *United States v. Menasche,* 348 U.S. 528, 538-39 (1955). The Ninth Circuit itself has rejected the idea that cumulative vague elements, each with a separate meaning, cancel each other out to provide clarity. *Nunez v. City of San Diego,* 114 F.3d 935, 941 (9th Cir. 1997).

The dancers explained in the District Court through their own testimony and the reports of their experts that the essential vehicle for their communication is not their particular bodily movements, but their proximity to the patrons. (ER 242-43, 504, 506-10, 535-40, 557, 608-609, 625-26, 647-48, 697.) As Dr. Hanna put it, "In creating an illusion of concern and availability for the patron through proximity in her dance, the performer seeks to effect a transformation in the patron's feelings." (ER 540.) In short, she concluded that "proximity"

is an "essential and integral expressive component[] of the dance." (ER 546.) The dancers agreed. (ER 608-609, 625-26, 647-48, 718.)

Therefore, to remain within two feet of patrons so they can convey their message of empathy and concern, the dancers must know how to perform a dance that is *not* "sexually-oriented" within the meaning of the ordinance, but without unnecessarily "depriv[ing themselves] of a repertoire of expressive elements." *Schultz, supra,* 228 F.3d at 847. *See R.V.S., supra,* 361 F.3d at 414 ("to avoid the Ordinance dancers must not convey an erotic message through their movements"). Any construction of the definition based upon the dim light each element casts on the others gives them no guidance in their efforts to avoid being included in the definition.

Despite the need for clarity so the performers can avoid the status of "adult cabaret dancers," the City official in charge of enforcing the ordinance confirmed that the dancers violate the two-foot rule at their peril. He confirmed that the City has given its officers no training in interpreting the ordinance, although the challenged terms admittedly are "vague," "very subjective," "in the eye of the beholder," likely to be interpreted differently by different enforcement officers, and dependent not only upon the performer's conduct, but upon the individual officer's anticipation of "what the performer's going to do" in the future. (ER 810-12, 815, 818-19, 829, 835.)

The Court of Appeals did not resolve these concerns. Instead, it expressly gave the definition a circular, all-encompassing construction, and deemed *any* dance performed in the club to be "sexually expressive" and therefore necessarily within the scope of this elusive definition:

> The appellant dancers argue that they . . . need to know how not to be "adult cabaret dancers." In other words, they assert that they need to know how to continue their sexually expressive performances within two feet of their patrons.

(App. A at 8a n.3.) Likewise, the Court of Appeals accepted as a given fact that "the appellant dancers' performances . . .

"focus[] on or emphasize[] . . . breasts, genitals, and or buttocks." (App. A at 15a.) By assuming at the outset that the dancers meet the definition of "adult cabaret dancer," the Court did not resolve the vagueness challenge, but avoided it.

The second factor cited by the Court of Appeals is that the ambiguities in the ordinance are in the definition of "adult cabaret dancer," while the restriction on the dancer's conduct (*i.e.*, the two-foot requirement) is unambiguous. Therefore, the Court reasoned, the ordinance is sufficiently clear, because "although the definition of an 'adult cabaret dancer' contains subjective terms, the prohibited conduct is defined objectively." (App. A at 7a.)

However, there is no authority for the distinction between vagueness in the definition of the regulated party and vagueness in the definition of the proscribed conduct, and the distinction is logically meaningless. There is no difference between an ordinance prohibiting a "sexually-oriented dancer" from engaging in the conduct of approaching within two feet of a patron, and an ordinance prohibiting anyone who is within two feet of a patron from engaging in the conduct of performing a "sexually-oriented dance." Under the Court's reasoning, municipalities may avoid the requirements of the vagueness doctrine simply by inverting the syntax of unintelligible legislation. The Court's decision has created a new and illogical doctrine likely to cause confusion and inconsistent rulings in a wide range of contexts extending far beyond the sphere of adult entertainment.

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), this Court addressed an ordinance that defined "loiter" as "to remain in any one place with no apparent purpose." *Id.* at 47. The Court held the ordinance to be unconstitutionally vague, ruling that "The 'no apparent purpose' standard for making that decision is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *Id.* at 62.

As McPhail effectively conceded, the meaninglessness of the terms in the City's definition of "adult cabaret dancer" "impermissibly delegates basic policy matters to policemen,

judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). Thus, for example, in *United States v. Loy*, 237 F.3d 251, 266 (3d Cir. 2001), the Third Circuit found a restriction on "pornography" to be unconstitutionally vague because "there is a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating."

The prospect of idiosyncratic enforcement is not a danger, but a certainty. McPhail testified that the determination of who is an adult cabaret dancer, and therefore subject to the two-foot distance limitation, is "in the eye of the beholder," and is a function of what the individual police officer "predict[s] or reasonably expect[s] . . . the performer's going to do" in the future. (ER 810, 818-19.) The resolution of the issue is not even the product of a subjective and standardless interpretation of the performer's actual conduct, but of each officer's unchecked ability to anticipate actions that have not yet occurred.

The decision of the Court of Appeals is also contrary to numerous other cases involving the very same phrases found in the definition of "adult cabaret dancer."

For example, in *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001), the Sixth Circuit addressed an ordinance defining "sexually oriented" as "distinguished or characterized by an emphasis on matter depicting, describing or relating to . . . 'specified sexual activities' or 'specified anatomical areas.'" *Id.* at 387-88. Although "specified sexual activities" and "specified anatomical areas" both were defined, the Court concluded that the phrase *sexually oriented* is an "apparently meaningless term" (and therefore vague), *id.* at 389, as well as overbroad. *Id.* at 387-88. Here, Gammoh and the dancers must interpret the same phrase in the *absence* of "specified sexual activities" and display of "specified anatomical areas." The phrase therefore is even vaguer as used by La Habra than it was in *Deja Vu*.

The Ninth Circuit itself concluded that the phrase *sexually oriented* is unconstitutionally vague in *United States v. Antelope*, 395 F.3d 1128, 1141 (9th Cir. 2005), decided one day after the decision in the present case.

Likewise, in *Eggert Group, LLC v. Town of Harrison*, __ F. Supp. 2d __, 2005 WL 1364540 (No. 04-C-759) at *14 (E.D. Wisc. June 8, 2005), the Court ruled that a limitation on adult entertainment based upon the type of performance featured on a "regular basis" was incomprehensible.

The difficulties that dancers and club managers have in complying with the definition are greatly augmented by the relatively benign context in which the definition applies. By specifically excluding from the definition of "adult cabaret dancer" all sexually-explicit, nude, and topless performances, as well as all depictions of "specified sexual activities," the La Habra ordinance eliminates any bright-line test of what conduct is "sexually-oriented" and what is not. The Seventh Circuit recently annulled a similar ordinance regulating undefined "erotic dance[s]" by clothed performers in adult venues. *R.V.S., supra*, 361 F.3d at 404. The Court recognized that while "what constitutes sexually explicit but non-obscene expression can be difficult to define" in any case, the uncertainties of interpretation are compounded when an ordinance "removes nudity from the calculus and seeks to regulate clothed individuals." *Id.* at 415.

B. Overbreadth

> Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (citation omitted).

The definition of "adult cabaret dancer" is overbroad because it can include a wide variety of innocuous performances that could not lead to adverse secondary effects. The risk of overbreadth is particularly great because the ordinance regulates the conduct of clothed performers. As Dr. Hanna explained, the definition of "adult cabaret dancer" could reasonably be interpreted to include dancers performing flamenco, the tango, and the Charleston. (ER 92-100.)

Thus, for example, in *R.V.S., supra,* 361 F.3d 402, the Seventh Circuit found a regulation governing "clothed dancers who convey an erotic message through their movements" to be overbroad:

> While understandably aimed at entertainers of a more "adult" persuasion, there exists the potential that mainstream performances could fall under the purview of the Ordinance. Simply, Rockford has not presented justification why it is essential to regulate such a wide universe of dance.

Id. at 412, 413.

Likewise, in *Deja Vu, supra,* 274 F.3d at 387-88, the Sixth Circuit ruled that the term *sexually oriented* is overbroad because it "could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent." *See also Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 585 n.2 (1991) (Souter, J., concurring); *Triplett Grille, Inc. v. City of Akron,* 40 F.3d 129, 135-36 (6th Cir. 1994).

Review by this Court therefore is essential to avoid the imposition of similar incomprehensible, subjective, and overinclusive standards on this most innocuous form of "adult entertainment."

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OTHER DECISIONS OF CIRCUIT COURTS PRECLUDING REGULATION OF THE GENERAL NATURE OF THE MOVEMENTS OF CLOTHED DANCERS IN ADULT-ENTERTAINMENT VENUES.

The ruling of the Court of Appeals permitting the City to regulate the general nature of the movements of clothed dancers directly conflicts with decisions of the Seventh Circuit, dictum by the Eighth Circuit, and a prior decision of the Ninth Circuit, as well as with decisions of various District Courts.

In *Schultz v. City of Cumberland, supra,* 228 F.3d 831, the Seventh Circuit annulled an ordinance restricting "sexually explicit dance movements," such as a dancer's "fondling or erotic touching" of her own clothed buttocks or breasts. *Id.* at 847. The Court held that a regulation may not restrict certain types of dance movements:

> By restricting the particular movements and gestures of the erotic dancer . . . the Ordinance unconstitutionally burdens the protected expression. The dominant theme of nude dance is an emotional one; it is one of eroticism and sensuality. [The Ordinance] deprives the performer of a repertoire of expressive elements with which to craft an erotic, sensual performance and thereby interferes substantially with the dancer's ability to communicate her erotic message. It interdicts the two key tools of expression in this context that imbue erotic dance with its sexual and erotic character — sexually explicit dance movements and nudity.

Id. at 847.

Again, in *R.V.S. v. City of Rockford, supra,* 361 F.3d 402, the Seventh Circuit annulled an ordinance restricting the movements of "clothed dancers who convey an erotic message through their movements," following its reasoning in *Schultz*. *Id.* at 412-14.

Likewise, the Eighth Circuit has addressed an ordinance restricting clothed dances that are "distinguished or characterized by an emphasis on matters depicting, describing, or relating to specified sexual activities." *Jake's, Ltd. v. City of Coates, supra,* 356 F.3d at 903. The Court observed that "Determining whether this live entertainment by clothed dancers is 'characterized by an emphasis on matters . . . relating to specified sexual activities' is a fact-intensive and, perhaps more importantly, controversial inquiry that may even raise additional First Amendment issues." *Ibid.* (ellipsis in original).

The decision in this case is also contrary to the Ninth Circuit's own recent decision in *Dream Palace v. County of Maricopa,* 384 F.3d 990 (9th Cir. 2004), where the Court held that the prohibition on the representation of "specific sexual activity" by nude *or* clothed entertainers was unconstitutional because a municipality may not restrict performances on the basis of the sexual or erotic nature of the dancers' movements:

> In prohibiting dancers from engaging in "simulated sex acts," whatever they may be, the county appears to have proscribed the particular movements and gestures that a dancer may make during the course of a performance. One is left to speculate as to what movements, precisely, a dancer may incorporate in a performance without running afoul of section 13(e), and yet still effectively convey an essentially adult, erotic, message to the audience. The prohibition applies even if the dancer is at least partially clothed. If Elvis' gyrating hips can fairly be understood to constitute a "simulated sex act," one can fully appreciate the potential scope of the restrictions placed on erotic dancers in Maricopa County.

Id. at 1018.[4]

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[4] The Court of Appeals distinguished *Dream Palace* on the ground that it involved "a complete ban on nude and semi-nude dancing," while the ordinance in the present case "prescribes where offstage dancing can occur (at least two feet away from patrons) but it does not ban any form of dance." (App. A at 12a-13a.) However, *Dream Palace* addressed the (Cont'd)

District Courts also have found such general restrictions on dance movements to violate the First Amendment. *E.g., Brownell v. City of Rochester*, 190 F. Supp. 2d 472, 490-92 (W.D.N.Y. 2001); *Score LLC v. City of Shoreline, supra*, 319 F. Supp. 2d at 1235-37; *Eggert Group v. Town of Harrison, supra*, __ F. Supp. 2d __, 2005 WL 1364540 at *16.

There can be little doubt that the purpose and effect of the ordinance are to limit the dancers' ability to express themselves by "proscrib[ing] the particular movements and gestures that a dancer may make during the course of a performance." *Dream Palace, supra*, 384 F.3d at 1018. Section 7(F) imposes the two-foot rule only during "performances." When the "performance" is over, § 7(G) allows unlimited proximity between dancer and patron, and even allows them to grope and kiss each other (although the dancers at Gammoh's club do not engage in such conduct with patrons).

There is now a conflict between the Seventh Circuit (joined in dictum by the Eighth Circuit) and the Ninth Circuit regarding whether a municipality may regulate the general movements of a dancer during a clothed performance. Given the large number of adult uses in the United States and the trend toward less explicit forms of adult entertainment demonstrated by the cases cited in footnote 1 above, it is essential for municipalities and club owners alike that this Court determine whether clothed dancing may be regulated

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(Cont'd)
provision in the Maricopa County ordinance barring nude and semi-nude dancing, and the provision barring certain dance movements, as independent constitutional violations. The result would have been the same on the latter point even if the ordinance had not forbidden nudity, because the county was improperly "restrict[ing] the particular movements and gestures a dancer may or may not make during the course of a performance." *Dream Palace, supra*, 384 F.3d at 1019 (emphasis omitted). Moreover, the critical issue in *Dream Palace* was not the outright *ban* on portrayals of "specific sexual activity," but rather the distinction it made on the basis of the dancer's movements: "Section 13(e) does not simply ban *or restrict* certain conduct, irrespective of any message that the conduct may be intended to convey; instead, by its own terms the Ordinance is directed to activity that conveys eroticism or sexuality." *Id.* at 1020 (emphasis added; citation omitted).

on the basis of either the nature of the dancer's movements or the abstract message the dancer conveys.

III. A MUNICIPALITY MAY NOT PRECLUDE CLOTHED PERFORMERS IN ADULT-ENTERTAINMENT VENUES WHO APPROACH BUT DO NOT TOUCH PATRONS FROM EXPRESSING THEMSELVES THROUGH THE MEDIUM OF DANCE WHEN THE MUNICIPALITY DOES NOT CONTEND THAT THE DANCES CAUSE ADVERSE SECONDARY EFFECTS.

A. Strict scrutiny applies to the two-foot rule.

Under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *City of Los Angeles v. Alameda Books, Inc., supra*, 535 U.S. 425, a court evaluating an adult-use regulation must first determine whether a restriction is "a time, place, and manner regulation." If it is, the *Renton/Alameda* protocol continues. However, if it is a ban on expression, strict scrutiny applies. *Alameda Books, supra*, 535 U.S. at 443.

By its own terms, the City's ordinance is a ban on expression. Section 7(F) imposes a two-foot restriction only during "performances." When the "performance" is over, § 7(G) allows the dancer and patron to approach, caress, and even kiss each other. Thus, the ordinance does not preclude proximity between performer and patron, but only limits the circumstances in which the performer may express herself through dance.

"[A] city may not attack secondary effects indirectly by attacking speech." *Id.* at 450 (Kennedy, J., concurring).[5] The restriction in this case is a pure attack on speech, because it does not limit the purported cause of adverse secondary effects, namely proximity and physical contact,[6] but only limits a

[5] *Alameda Books* contains no majority opinion. Justice Kennedy's concurring opinion is generally considered to be the narrowest opinion joining in the judgment of the Court. *E.g., Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003), citing *Marks v. United States*, 430 U.S. 188, 193 (1976); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 n.1 (8th Cir. 2003).

[6] The ordinance itself identifies proximity and physical contact as (Cont'd)

dancer's right to express herself through her art while she is in proximity to a patron.

B. The two-foot rule fails strict scrutiny.

Under the "strict scrutiny" standard, the City "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105, 118 (1991). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

Gammoh does not contest the legitimacy of the City's asserted goals of preventing crime and the spread of sexually-transmitted diseases. Rather, his point is that the ban on proximity between patrons and clothed dancers during performances cannot possibly "serve the Government's purpose" if the dancers and patrons are free to approach and touch each other as soon as the performances are over. A restriction on proximity and physical contact that is only in effect while the dancer is conveying an artistic message does not even arguably reduce adverse secondary effects. It is, in fact, not a restraint on proximity or physical contact at all, but a pure restraint on expression.

C. The decision of the Court of Appeals conflicts with the requirements of *Alameda Books*.

An adult-use ordinance survives intermediate scrutiny if it is "designed to serve a substantial governmental interest and do[es] not unreasonably limit alternative avenues of communication." *Renton, supra*, 475 U.S. at 47; *Alameda Books, supra*, 535 U.S. at 441. The ordinance must be "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Renton, supra*, 475 U.S. at 52.

(Cont'd)

causes of adverse secondary effects. Ordinance 1626, §§ 1(O)-(Q). (App. C at 62a-63a.) It does not identify the dances themselves as sources of harm.

Alameda Books established two main queries for evaluating whether an ordinance is designed to serve a substantial government interest: "First, what proposition does a city need to advance in order to sustain a secondary-effects ordinance? Second, how much evidence is required to support the proposition?" *Alameda Books, supra*, 535 U.S. at 449 (Kennedy, J., concurring). The decision of the Court of Appeals is contrary to decisions of this Court and other Courts of Appeals in answering these questions.

The "city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Ibid.* In particular, "a city may not assert that it will reduce secondary effects by reducing speech in the same proportion." *Ibid.* Rather, the regulation must "suppress secondary effects -- and not by suppressing speech." *Ibid.* "The ordinance may identify the speech based on content, but only as a shorthand for identifying the secondary effects outside." *Ibid.*

Here, the "proposition" underlying the two-foot rule is that in adult venues where alcohol is not served, adverse secondary effects are caused by mere proximity between clothed performers and patrons *if the performers are dancing*, and that the effects will be reduced if the proximate dancing (rather than the proximity itself) is reduced.

The dancers testified, without contradiction, that the type of communication they have with patrons cannot occur if they must continuously maintain a distance of at least two feet from them. (ER 608-609, 625-26, 647-48, 718.) Drs. Hanna and Linz demonstrated with uncontested empirical and anthropological data that the content of the expression conveyed by proximate dancing is categorically different from the messages conveyed by solo dancing at a distance. (ER 242-43, 504, 506-510, 535-40, 546.)

Thus, if the dancers and Drs. Hanna and Linz are correct, the ordinance does not anticipate that the regulated form of expression will be "substantially undiminished," but rather

that it will be eliminated entirely. This is the very proportional regulation that Justice Kennedy condemned in *Alameda Books*.

In fact, the diminution in speech greatly *exceeds* the proportionate reduction in secondary effects, because the City's "proposition" is absurd on its face. The ordinance itself does not limit proximity or touching between dancer or patron at all. Rather, it limits expression through the medium of dance. The idea that adverse secondary effects can result from the abstract communication imparted by a clothed dancer's movements has no support in the lengthy findings within the ordinance, in any study cited in the ordinance, or in common sense.

Alameda Books prescribed a three-step analysis to answer the question of "how much evidence is required to support the proposition" underlying an ordinance. *Alameda Books*, *supra*, 535 U.S. at 449 (Kennedy, J., concurring). First, the "municipality's evidence must fairly support the municipality's rationale for its ordinance," which cannot be based upon "shoddy data or reasoning." *Id.* at 438. Second, the plaintiffs may "cast[] doubt on [the] municipality's rationale" "either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings." *Id.* at 438-39. Third, if the "plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 439.

Gammoh has rebutted not only the theory that dancing causes secondary effects, but also the theory that proximity between dancer and patron has adverse effects. Even if the latter idea, which is not the City's "proposition," is deemed "fairly supported" by the evidence, Gammoh has met his burden of "casting doubt" on it. He has presented exhaustive evidence from experts and eyewitnesses, including rigorous statistical analyses of data gathered in other communities, a detailed analysis of data compiled by the City of La Habra itself (which the City had not considered), an empirical study

of the effect of distance on the conveyance of expressive content by dancers in adult theaters, a thorough discussion of the same issue by a noted anthropologist, testimony from the dancers about the effect of a distance requirement on their ability to communicate, and testimony from club employees about security, crime prevention, and the behavior of patrons.

The Court of Appeals did not evaluate the merits of Gammoh's extensive evidentiary presentation. Instead, it only discussed, and rejected, Gammoh's challenge to the City's own methods of gathering evidence.[7]

By deeming criticism of the City's methodology to be the *only* appropriate means of satisfying a plaintiff's burden under *Alameda Books*, the Court of Appeals effectively negated the principle that a plaintiff may "cast[] doubt on [the] municipality's rationale" by "furnishing evidence that disputes the municipality's factual findings." *Id.* at 438-39. There has to be *something* a plaintiff can do to shift the burden back to a municipality. If Gammoh has not done it in this case, it cannot be done.

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[7] Contrary to the implications of the Court of Appeals (App. A at 21a and n.5), Gammoh never suggested that a city's own crime statistics are "the only reliable information" a city may rely upon, or that the evidence supporting a restriction must comply with the standards established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

IV. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS REGARDING WHETHER A MUNICIPALITY MAY RESTRICT CLOTHED NO-CONTACT DANCING IN ADULT-ENTERTAINMENT VENUES SOLELY ON THE BASIS OF STUDIES OF THE SECONDARY EFFECTS OF NUDE ENTERTAINMENT IN OTHER JURISDICTIONS, WHILE IGNORING EXTENSIVE DATA, ALREADY IN ITS POSSESSION AT THE TIME OF ENACTMENT, PROVING THAT ADULT ENTERTAINMENT WITHIN ITS OWN BORDERS DOES NOT CAUSE ADVERSE SECONDARY EFFECTS.

Ordinance 1626 must be "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." *Renton, supra,* 475 U.S. at 52.

The ordinance identifies the adverse secondary effects of adult uses it seeks to reduce as crime (§§ 1(C)(1), 1(E)(3)), 1(Q)(2), economic harm (§ 1(C)(2)), and the spread of sexually-transmitted diseases. §§ 1(E)(5)-(6), 1(F), 1(G). (App. C. at 53a, 55a-58a, 63a.) The Ordinance purports to be based upon seventeen "studies concerning the adverse secondary effects of adult businesses in other cities." § 1(C) (App. C at 52a-53a). However, none of the studies cited by the City contains any suggestion that proximate clothed dancing without physical contact causes adverse secondary effects. Instead, the City relied solely upon evidence regarding the effects of nudity, physical contact, and the serving of alcohol, none of which is involved in the two-foot rule.

Like La Habra, Manatee County in Florida had statistics showing that the incidence of crime within its borders was less near adult clubs than elsewhere, and that property values increased in the vicinity of the clubs. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County,* 337 F.3d 1251, 1271-72 (11th Cir. 2003). The county had relied upon numerous foreign studies of secondary effects in enacting an adult-use ordinance. Like Gammoh, the plaintiffs submitted studies "utilizing the County's own crime statistics that examined the criminogenic

effects of the [plaintiffs'] specific businesses and found that [plaintiffs'] businesses did not cause such effects." *Id.* at 1271. The Court concluded that the plaintiffs had met their burden under *Alameda Books* of "casting doubt" on the evidence relied upon by the county, and that the ordinance was not "narrowly tailored:"

> [W]e have before us an ordinance adopted only on the basis of speculative findings and outdated, foreign studies whose relevance to local conditions appears questionable in light of current data Appellants have placed in the record suggesting that plaintiffs' businesses, which have operated continuously in Manatee County for over fifteen years, do not cause secondary effects. Under these circumstances, we cannot credit the County with complying with *Renton's* narrow tailoring requirement, which requires that a secondary effects ordinance be drawn to affect only that category of business "*shown to produce* the unwanted secondary effects."

Id. at 1272, quoting *Renton, supra,* 475 U.S. at 52 (emphasis in original).

Likewise, Fulton County in Georgia had statistics showing that adult uses did not cause harm within its borders. *Flanigan's Enterprises, Inc. v. Fulton County,* 242 F.3d 976, 979, 986 (11th Cir. 2001). Nevertheless, relying on studies from other jurisdictions, the county determined that adult clubs cause crime and deterioration in property values, and it limited their operation accordingly. *Id.* at 985-96. The Eleventh Circuit ruled again that "it was unreasonable for [the county] to rely on remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions." *Id.* at 986. The same conclusion applies to the La Habra ordinance.

Similarly, the Seventh Circuit has ruled that a municipality cannot justify its regulation of *clothed* entertainment on the

ground that its regulation of *nude* entertainment reduces adverse secondary effects:

> It is arguable that at least some forms of clothed entertainment may initiate adverse secondary effects similar to the ones caused by establishments featuring nude and semi-nude entertainment. However, a municipality must offer sufficient evidence in support of this proposition.

R.V.S., supra, 361 F.3d at 415-16.

> While it may have been reasonable for [the city] to believe that the evidence presented at trial was relevant to demonstrate a connection between adverse secondary effects and nude or topless dancing, we conclude that it falls short of being relevant to establishing a meaningful connection between negative secondary effects and the [clothed] entertainment to which the Ordinance applies.

Id. at 412.

The Eighth Circuit agrees that the restriction of each regulated activity in an adult-use ordinance must independently reduce secondary effects. *Ways v. City of Lincoln,* 274 F.3d 514, 519 (8th Cir. 2001) ("Because the ordinance burdened First Amendment expression that has not been shown clearly to contribute to the problems the city sought to solve, it was not appropriately tailored to achieve its stated purposes").

Other courts have made similar rulings. For example, in *MDK v. Village of Grafton, supra,* 345 F. Supp. 2d 952, the Court specifically held that a restriction on dancers clad in swimwear (like the dancers in the present case) could not be based upon studies of secondary effects caused by nude entertainment:

> [D]efendant has not shown that establishments in which dancers wear bathing suits generate negative secondary effects. Defendant has cited no studies linking dancers wearing bathing suits with negative secondary effects. Further, defendant cites no judicial

> opinion recognizing that establishments in which dancers wear bathing suits generate negative secondary effects. Finally, defendant may not assume that such establishments generate negative secondary effects.

Id. at 958. *See also J.L. Spoons v. Morckel, supra,* 314 F. Supp. 2d at 759-60; *Clarkson v. Town of Florence,* 198 F. Supp. 2d 997, 1010-11 (E.D. Wisc. 2002); *Nakatomi Investments, Inc. v. City of Schenectady,* 949 F. Supp. 988, 997 (N.D.N.Y. 1997).

> Without demanding this connection at each step, each additional layer of restriction can be legally added simply on the basis that the previous restriction was valid, until the entire activity is banned: *i.e.*, nude dancing is permitted so long as the dancers wear pasties and G-strings; then bathing suits; then t-shirts; then long pants and a sweater.

Ibid.

This is a case of superlatives. First, the regulated conduct at issue, proximate, clothed, no-contact dancing in an alcohol-free setting, is more modest than that involved in virtually any other "adult entertainment" case.

Second, the evidence supporting the City's "proposition" that proximate clothed dancing causes adverse secondary effects is as weak as the evidence offered by any municipality in support of any other ordinance. None of the City's studies addresses clothed dancing, and the City has not offered any rationale for the idea that proximate clothed dancing causes adverse secondary effects that would not be caused anyway by proximity (and physical contact) between dancer and patron as soon as the performance ends.

Third, Gammoh has presented as compelling and comprehensive an evidentiary challenge to the City's rationale as any plaintiff has in any other adult-use litigation.

When the regulated conduct is tame enough to appear on prime-time broadcast television, *and* there is no evidence at all that it causes any adverse effects, *and* whatever benefit the

regulation may provide dissipates the moment the performance is over, one must acknowledge that the extensive regulatory authority properly given to municipalities has been abused.

In *Alameda Books* and its progeny, this Court and every other court to address the issue have acknowledged that there is a point in the process where a plaintiff's presentation is sufficient to shift the burden back to the municipality. If Gammoh is not even entitled to a trial on his challenge to the senseless and unsupported two-foot rule, the burden-shifting *Alameda Books* process has no meaning in the Ninth Circuit, and municipalities will be free to enact whatever arbitrary adult-use restrictions they want, so long as they cut and paste the standard recitations about "studies" into the preambles of their ordinances.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC AND AMENDED OPINION FILED JANUARY 26, 2005 AND AMENDED APRIL 1, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-56072

BILL BADI GAMMOH, dba Taboo Theater aka Pelican Theater; LESLIE WEST; ARMINE MICHELLE BEDROSIAN; CHRISTINE JOHANNA FENER; CHARBONESSE GARRETT; HEATHER ELOISE ELAM; STACY JOY ANDRE; MEGHANN LARA ANN ONSELEN,

Plaintiffs-Appellants,

v.

CITY OF LA HABRA,

Defendant-Appellee.

D.C. No. CV-03-00911-GLT

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING EN BANC AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Appendix A

Argued and Submitted
November 1, 2004—Pasadena, California

Filed January 26, 2005
Amended April 1, 2005

Before: A. Wallace Tashima, Raymond C. Fisher, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman

OPINION

TALLMAN, Circuit Judge:

This case involves constitutional challenges to a city ordinance requiring "adult cabaret dancers" to remain two feet away from patrons during performances. The district court rejected these challenges by dismissing some of the Appellants' claims on the pleadings and granting summary judgment as to other claims. We denied emergency motions for a stay of enforcement of the Ordinance pending appeal and now affirm.

I

The City of La Habra's (City's) Municipal Ordinance 1626 ("Ordinance") regulates adult businesses. The first section of the Ordinance contains extensive findings that adult businesses generate crime, economic harm, and the spread of sexually transmitted diseases. These findings are based on studies and police declarations from other jurisdictions, federal and state judicial opinions, and public health data from surrounding

southern California counties. Ordinance, § 1. Other sections of the Ordinance contain regulations purporting to address the secondary effects described in the first section, including a prohibition of physical contact between patrons and performers (the "no-touch rule") and a requirement that adult cabaret dancers perform at least two feet away from their patrons (the "two-foot rule"). Ordinance, §§ 4, 7.

The Appellants are Bill Badi Gammoh, the owner of an adult establishment in the City, several dancers at Gammoh's club, and a dancer who has been offered employment at Gammoh's club but has not yet accepted it. Gammoh's establishment, which does not serve alcoholic beverages, features entertainment by dancers who perform nude on stage and then dress in minimal clothing before offering one-on-one offstage dances.[1] The Appellants do not challenge the provisions of the Ordinance governing on-stage dancing and other aspects of the operation of an adult cabaret; they challenge only the two-foot rule.

Three weeks after the City Council passed the Ordinance, the Appellants filed their constitutional challenge in the Superior Court of California for Orange County. The case was subsequently removed to the United States District Court

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1. Early in this litigation before the district court the Appellants used the term "lap dance" to refer to these performances. They later distanced themselves from this term, preferring "clothed proximate dancing" instead. We reference these individual, close-up performances using the term "offstage dancing" because the City regulates nude on-stage performances separately from partially-clothed offstage performances and it is the latter set of regulations that are challenged here.

for the Central District of California. The Appellants were unsuccessful before the district court. In addition to other rulings that the Appellants do not challenge on appeal, the district court dismissed the Appellants' overbreadth argument and part of their vagueness challenge with prejudice, and entered summary judgment in favor of the City on their regulatory takings claim, a First Amendment challenge, and the remaining vagueness argument. The Appellants pursue their vagueness, overbreadth, takings, and free speech and expression claims on appeal.

II

The Ordinance's two-foot rule applies exclusively to "adult cabaret dancers." The Ordinance defines an "adult cabaret dancer" as:

> any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting or engaging in "specified sexual activities." Adult cabaret dancer does not include a patron.

Ordinance, § 4. The district court rejected the Appellants' assertion that this definition is vague and overbroad because

it contains subjective terms. We review the district court's ruling *de novo*. *See United States v. Rodriguez*, 360 F.3d 949, 953 (9th Cir. 2004); *United States v. Linick*, 195 F.3d 538, 541 (9th Cir. 1999).

A

To survive a vagueness challenge, a regulation must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also United States v. Adams*, 343 F.3d 1024, 1035 (9th Cir. 2003), *cert. denied*, 123 S. Ct. 2871 (2004). A greater degree of specificity and clarity is required when First Amendment rights are at stake. *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir. 1986).

The Appellants argue that the subjective language used to define an "adult cabaret dancer" makes the definition, and thus the Ordinance, unconstitutionally vague. *Cf. City of Chicago v. Morales*, 527 U.S. 41, 56-64 (1999) (holding a provision criminalizing loitering, which is defined as "to remain in any one place with no apparent purpose," void for vagueness because the provision was "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene"); *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 554-55 (9th Cir. 2004) (holding a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" void for vagueness because it "subjected physicians to sanctions based not on their own

objective behavior, but on the subjective viewpoint of others") (internal quotation and citation omitted); *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1095 (9th Cir. 1999), *aff'd sub nom. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding a provision that criminalized sexually explicit images that "appear[ ] to be a minor" or "convey the impression" that a minor is depicted unconstitutionally vague because it was unclear "whose perspective defines the appearance of a minor, or whose impression that a minor is involved leads to criminal prosecution").

Several of the terms within the Ordinance's definition of "adult cabaret dancer"—"sexually oriented dancer," "exotic dancer," "similar dancer," "regular basis," and "focuses on or emphasizes"—are unarguably subjective. However, two main factors distinguish the Ordinance from cases such as *Morales*, *Tucson Women's Clinic*, and *Free Speech Coalition*, where the regulations were held to be too subjective to give notice to ordinary people or guidance to law enforcement: 1) the subjective terms in the Ordinance are used in combination with other terms, and 2) the subjective terms do not define prohibited conduct.

This circuit has previously recognized that otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity. *See Kev*, 793 F.2d at 1057 (holding that an ordinance prohibiting dancers from "caressing" and "fondling" patrons was not vague "in the context of the other definitions provided in the ordinance" at issue). In this case, the district court recognized that the two-foot rule applies only to "adult

cabaret dancers" who meet the following five qualifications: 1) the individual must perform at an "adult cabaret";[2] 2) the performer must perform as a sexually-oriented dancer, exotic dancer, stripper, or similar dancer; 3) the performance must focus on or emphasize the performer's breasts, genitals, and/or buttocks; 4) the performance must have this focus or emphasis on a regular basis; and 5) the performance must have this focus or emphasis on a substantial basis. Thus, an "adult cabaret dancer" is defined by a combination of features, not by any one subjective term. The combined terms outline the performer, the place of the performance, and the type of performance. Each of the five limitations provides context in which the other limitations may be clearly understood. The definition as a whole gives notice to performers and ample guidance to law enforcement officers as to who is and who is not an "adult cabaret dancer."

Furthermore, although the definition of an "adult cabaret dancer" contains subjective terms, the prohibited conduct is defined objectively. It is not illegal to be an adult cabaret dancer; only to be an adult cabaret dancer performing within

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2. The City of La Habra Code defines "adult cabaret" as:

> a nightclub, bar or other establishment (whether or not serving alcoholic beverages) which features live performances by topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers, or similar entertainers, and where such performances are distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas."

City of La Habra Code § 18.60.010.

two feet of a patron. This distinction introduces additional objectivity into the Ordinance because the act that is prohibited—being within two feet of a patron—is certainly not vague.[3]

Vagueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms. *See Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("we can never expect mathematical certainty from our language"). In this case, a combination of subjective and objective terms is used to give a clear picture of an "adult cabaret dancer" and the conduct prohibited of such a dancer is defined objectively. Thus, the definition of "adult cabaret dancer" is sufficiently clear to give notice to performers and guidance to law enforcement. *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001) ("perfect clarity is not required even when a law regulates protected speech").

B

The Appellants claim that the definition of "adult cabaret dancer" is overbroad because it could apply to mainstream or avant-garde performances as well as adult entertainment. The Supreme Court and this circuit have emphasized that

3. The appellant dancers argue that they will not relinquish their proximity to patrons, and thus need to know how not to be "adult cabaret dancers." In other words, they assert that they need to know how to continue their sexually expressive performances within two feet of their patrons. This, however, is exactly what the Ordinance prohibits. The fact that the regulation will necessarily alter the dancers' conduct does not make it vague.

"where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1198 (9th Cir. 2004) (quoting *Osborne v. Ohio*, 495 U.S. 103, 112 (1990) (internal quotations omitted)). In this case, potentially overbroad applications of the Ordinance are minimal because performances occurring outside of an adult cabaret are unaffected by the Ordinance, and those occurring in an adult cabaret and containing the sexual emphasis that defines an "adult cabaret dancer" are within the Ordinance's legitimate sweep.

The Appellants were unable to cite any example of a performance that would fall within the Ordinance to which application of the Ordinance's restrictions would be overbroad. The examples proffered—including a duet, a tango, and an Elvis impersonator—are unpersuasive. A *pas de deux*, a ballroom dance, and an impersonation of the King each escapes the two-foot limitation unless performed in an establishment which features live performances by "topless and/or bottomless dancers, go-go dancers, exotic dancers, strippers or similar entertainers" characterized by an emphasis on " 'specified sexual activities' or 'specified anatomical areas.' " *See supra* note 2 (quoting City of La Habra Code § 18.60.010(C)). However, if they occur within an adult cabaret and the performer meets all five prongs of the definition of "adult cabaret dancer," these performances fall within the statute's legitimate sweep.

Regardless of whether the dance is a tango or more typical adult entertainment, requiring a two-foot separation between dance partners in this highly-charged sexual atmosphere may reasonably advance the City's legitimate goal of reducing secondary effects of adult entertainment. The two-foot rule may, for example, provide a line of sight for enforcement of the "no touch" rule and prevent exchanges of money and drugs. When performed in an adult cabaret, these performances, even if done in an Elvis costume, are thus within the statute's legitimate reach.

Even if the Appellants were able to identify performances that fulfill all aspects of an "adult cabaret dancer" but are not tied to the secondary effects the statute is designed to address, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Although we recognize that "the First Amendment needs breathing space," *World Wide Video*, 368 F.3d at 1198, in this situation there is no "realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Taxpayers for Vincent*, 466 U.S. at 801. If an overbroad application of the Ordinance exists, it is insubstantial when "judged in relation to the statute's plainly legitimate sweep." *See Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1973).

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III

The district court dismissed the Appellants' regulatory takings claim on summary judgment. We review this decision *de novo*. *Cal. First Amend. Coalition v. Calderon*, 150 F.3d 976, 980 (9th Cir. 1998). We "must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law." *Id.*

The takings clause of the Fifth Amendment protects *private property* from being taken for public use without just compensation. U.S. CONST. amend. V (emphasis added). "In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a 'property interest' that is constitutionally protected." *Schneider v. Cal. Dep't Corr.*, 151 F.3d 1194, 1198 (9th Cir. 1998) (internal citation omitted). The Appellants have not here pointed to a "property interest" interfered with by the City of La Habra's regulation of the dancers' conduct.[4] The district court thus properly dismissed the Appellants' takings claim.

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4. Certainly Mr. Gammoh and the dancers may suffer economic losses if patrons are unwilling to pay for dances that must be at least two feet away from customers. Their claim of right to this stream of income was essentially the basis of the vested rights argument that the Appellants made before the district court. The district court rejected this argument on summary judgment, and Appellants did not appeal that ruling.

IV

The Appellants argue that the Ordinance violates the First Amendment's guarantees of freedom of speech and expression. The district court evaluated the Ordinance under intermediate scrutiny and determined that the Appellants' First Amendment rights had not been violated. We review the district court's decision to grant summary judgment *de novo*, viewing the evidence in the light most favorable to the Appellants and looking for genuine issues of material fact. *See Calderon*, 150 F.3d at 980.

A

First, we must determine whether the Ordinance is a complete ban on protected expression. *See Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir. 2003) (plurality opinion) (citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986)). We conclude that it is not.

The two-foot rule merely requires that dancers give their performances from a slight distance; it does not prohibit them from giving their performances altogether. The rule limits the dancers' freedom to convey their erotic message but does not prohibit them from performing erotic one-on-one-dances for patrons. *See Renton*, 475 U.S. at 46. Because the dancers' performances may continue, albeit from a slight distance, this case stands in sharp contrast to our recent decision in *Dream Palace v. County of Maricopa*, where we applied strict scrutiny to an ordinance regulating adult businesses because

even the county conceded that the ordinance was a complete ban on nude and semi-nude dancing. 384 F.3d 990, 1018 (9th Cir. 2004). Here, the Ordinance prescribes where offstage dancing can occur (at least two feet away from patrons) but it does not ban any form of dance.

The Appellants argue that close propinquity to patrons is a key element of the dancers' expressive activity, and that the Ordinance is therefore a complete ban on a form of expression: "proximate dancing." This argument has been made and rejected in this circuit. *See Colacurcio v. City of Kent*, 163 F.3d 545, 549, 555 (9th Cir. 1998) (rejecting the argument that because "table dancing" is a unique form of dancing requiring proximity, a ten-foot separation requirement is a complete ban on this form of expression). It is true that if the dancers' expressive activity is considered "erotic dance within two feet of patrons" and not merely "erotic dance," this activity is completely banned. However, virtually no ordinance would survive this analysis: the "expression" at issue could always be defined to include the contested restriction. *See id.* at 556 (rejecting the idea that the applicable "forum" for a table dance is the area within ten feet of the performer). Protected expression is not so narrowly defined. *See Dream Palace*, 384 F.3d at 1019-20 (recognizing that the regulations in *Renton* and its progeny did not "proscribe absolutely certain types of adult entertainment" and instead enacted regulations that "avoid[ed] a total ban on protected expression").

"While the dancer's erotic message may be slightly less effective from [two] feet, the ability to engage in the protected expression is not significantly impaired." *Kev*, 793 F.2d at 1061. We hold that the Ordinance is not a complete ban on a protected form of expression.

Next, we must determine what level of scrutiny properly applies. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1164. Traditionally, the Court has utilized a distinction between content-based and content-neutral regulations to determine the appropriate level of scrutiny. *See e.g.*, *Renton*, 475 U.S. at 46-47. Time, place, and manner restrictions on adult businesses were considered content-neutral. *Id.* at 48.

Recently, however, the Supreme Court has recognized that virtually all regulation of adult businesses is content-based. *See Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring); *see also Ctr. for Fair Pub. Policy*, 336 F.3d at 1161 (recognizing Justice Kennedy's opinion in *Alameda Books* as controlling because it is the narrowest opinion joining the plurality's judgment). Content-based regulations are normally subject to strict scrutiny. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (describing the "necessary to serve a compelling state interest" strict scrutiny test).

However, designating regulation of adult establishments as content-based does not end the inquiry as to the appropriate standard of review. Content-based regulations may be analyzed under intermediate scrutiny if two conditions are met: 1) the ordinance regulates speech that is sexual or pornographic in nature; and 2) the primary motivation behind the regulation is to prevent secondary effects. *Ctr. for Fair Pub. Policy*, 336 F.3d at 1164-65 (citing *Alameda Books*, 535 U.S. at 434, 448).

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1

The Appellants differ from plaintiffs in previous cases regarding the regulation of adult businesses in that they wear minimal clothing for their offstage performances (although they perform nude on stage). The Appellants argue that the dancers' expressive activity is not sexual or pornographic because the dancers are "fully clothed." However, the appellant dancers testified that their outfits for offstage dancing include bikinis and g-strings, sometimes paired with a sheer skirt or top; at the very least, these accouterments stretch the term "fully-clothed." The dancers do cover their breasts and genitalia, but their argument that this removes their performances from the sphere of "sexual speech" ignores the context in which their offstage performances occur—in an adult cabaret, minutes after the dancers have performed nude on stage. *See Kev*, 793 F.2d at 1061 n. 12 (noting that "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved") (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 650-51 (1981)).

There is certainly a point along the continuum where suggestive speech no longer falls within the "sexual or pornographic" exception to the requirement of strict scrutiny. We are mindful that this case pushes us closer to that point than those cases where performers are nude or topless. "Sexual speech" has never been explicitly defined, but the appellant dancers' performances, which "focus[ ] on or emphasize[ ] . . . breasts, genitals, and or buttocks," occur in

adult establishments, are conducted by dancers who also perform nude, and involve minimal clothing, are certainly within the limits of "sexual speech." We therefore review the Ordinance as a regulation of "sexual or pornographic speech" and proceed to consider whether reducing the secondary effects of adult establishments is the Ordinance's primary purpose.

2

We generally accept that a regulation's purpose is to combat secondary effects if the enactment can be justified without reference to speech. *See Colacurcio*, 163 F.3d at 551-52 (citing *Kev*, 793 F.2d at 1058-59). We have recognized that "so long as the regulation is designed to combat the secondary effects of [adult] establishments on the surrounding community, namely[ ] crime rates, property values, and the quality of the city's neighborhoods . . . then it is subject to intermediate scrutiny." *Ctr. for Fair Pub. Policy*, 336 F.3d at 1164-65 (internal citation and quotation omitted); *see also Colacurcio*, 163 F.3d at 551 (9th Cir. 1998) (noting that an ordinance is subject to intermediate scrutiny if its "predominant purpose" is combating secondary effects). For plaintiffs, this is "a difficult standard to overcome." *Colacurcio*, 163 F.3d at 552.

To determine the purpose of the Ordinance, we look to "objective indicators of intent." *Id.* at 552; *see also Ctr. for Fair Pub. Policy*, 336 F.3d at 1165. In this case we have the materials that the City Council considered in determining whether to enact the Ordinance and the Ordinance itself. These indicators demonstrate that secondary effects were the City Council's concern.

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The record indicates that the City Council was presented with several volumes of materials prior to enacting the Ordinance. These included studies of secondary effects, declarations from police officers, reports on sexually transmitted diseases, and various other evidence. In a report to the City Council, the City Attorney recommended action to address the secondary effects reported in these resources: "[i]n reviewing the City's existing regulations and in light of the extensive existing case law and supporting studies, we conclude that this Ordinance is necessary to reduce and/or preclude these secondary effects." Our review of the materials that the City Council considered indicates that concern about secondary effects, as opposed to the content of the dancers' expression, motivated the challenged Ordinance.

The Ordinance itself also demonstrates that the City Council's purpose was to combat secondary effects. The Ordinance states that it is:

> necessary for the protection of the welfare of the people, as a result of the potential negative secondary effects of adult businesses, including crime, the protection of the city's retail trade, the prevention of blight in neighborhoods and the maintenance of property values, protecting and preserving the quality of the city's neighborhoods and the city's commercial districts, the protection of the city's quality of life, the increased threat of the spread of sexually transmitted diseases, and the protection of the peace, welfare and privacy of persons who patronize adult businesses.

Ordinance, § 1(A). This statement of purpose is supported by regulatory provisions that are logically linked to the

secondary effects, such as solicitation of prostitution and drug transactions, that the City identified: the Ordinance forbids contact between patrons and performers and, to make this rule enforceable, requires a two-foot separation between patrons and performers. Both the two-foot rule and the no-touching rule are reasonably linked to the secondary effects that the City identifies as its purpose in enacting the Ordinance.

We are not persuaded by the Appellants' argument that a speech-reducing motive is demonstrated by the fact that proximity between patrons and dancers is allowed when the dancers are not performing. The City may reasonably have decided that such regulations were impractical or unnecessary. The Appellants presented no evidence to support their speculation that the City chose only to regulate dancers when they are performing because it wished to regulate the performances' expressive content.

We are also unpersuaded by the Appellants' argument that a speech-reducing motive is demonstrated by a City employee's testimony that he overheard someone in staff meetings say that they wanted to drive appellant Gammoh out of business. The Appellants presented no evidence that the person who made these comments was on the City Council or affected the Council's decision to pass the Ordinance. Nothing connects this testimony to the process by which the Ordinance was passed. The testimony therefore does not create a genuine issue of material fact as to whether the City's stated goal of preventing secondary effects of adult businesses was its true purpose in enacting the Ordinance.

The Appellants have not raised a genuine issue as to the City's motivation in enacting the Ordinance. As Justice Kennedy wrote in *Alameda Books*, "[t]he ordinance may be a covert attack on speech, but we should not presume it to be so." 535 U.S. at 447. The objective indicators of the City's intent demonstrate a desire to combat secondary effects, and the Appellants have adduced no evidence that draws this motivation into question. The Ordinance must therefore be evaluated using intermediate scrutiny.

C

A statute will survive intermediate scrutiny if it: 1) is designed to serve a substantial government interest; 2) is narrowly tailored to serve that interest; and 3) leaves open alternative avenues of communication. *Ctr. for Fair Pub. Policy*, 336 F.3d at 1166; *see also Renton*, 475 U.S. at 50.

1

Reducing the negative secondary effects of adult businesses is a substantial governmental interest. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166 ("It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial."). The Appellants concede that preventing secondary effects is a substantial government interest, but argue that the City's evidence of secondary effects is flawed and inapplicable. We disagree.

The pre-enactment record in this case is substantial. *Cf. id.* at 1167-68 (describing the record as "a slim one" and

"hardly overwhelming" but concluding that the studies and public hearings relied on by the legislature were sufficient to demonstrate a connection between the regulated activity and secondary effects). The City Council was presented with, *inter alia*, seventeen studies on secondary effects of adult businesses, a summary of some of these studies, the 1986 Attorney General's Report on Pornography, declarations from investigating vice officers, an interview with nude dancers, a presentation on the harmful effects of pornography in nearby Los Angeles, numerous reports on AIDS and other sexually transmitted diseases, and thirty-nine judicial decisions in the area of regulation of adult businesses. These studies and reports meet the City's burden to produce evidence demonstrating a connection between its regulations and the secondary effects that the Ordinance is intended to address. *See Alameda Books*, 535 U.S. at 441; *Ctr. for Fair Pub. Policy*, 336 F.3d at 1166.

Because the City has met this burden, "[i]f plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39, *cited in Ctr. for Fair Pub. Policy*, 336 F.3d at 1160. The Appellants attempt to cast doubt by arguing that the studies on which the City relies are flawed and irrelevant.

The Appellants' proffered expert declared that the City's evidence was flawed because "systematically collecting police call-for-service information" and adhering to the

Appellants' suggested methodological standards were "the only reliable information" that could have supported the City's concern. This is simply not the law. "[S]o long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses [,]" it is sufficient to support the Ordinance. *Renton*, 475 U.S. at 51-52.[5] While we do not permit legislative bodies to rely on shoddy data, we also will not specify the methodological standards to which their evidence must conform. *See id.* at 51; *see also Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring) ("As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners."). The Appellants have failed to create a genuine issue of material fact as to the reliability of the collection of evidence upon which the City relied.

The Appellants also argue that even if the City's evidence is reliable, it is irrelevant because it does not measure the secondary effects of *clothed* performances. No precedent requires the City to obtain research targeting the exact activity

5. The Seventh Circuit has succinctly explained why clear proof of secondary effects is not required:

> A requirement of *Daubert*-quality evidence would impose an unreasonable burden on the legislative process, and further would be logical only if *Alameda Books* required a regulating body to prove that its regulation would—undeniably—reduce adverse secondary effects. *Alameda Books* clearly did not impose such a requirement.

G.M. Enters., Inc. v. Town of St. Joseph, Wis., 350 F.3d 631, 640 (7th Cir. 2003).

that it wishes to regulate: the City is only required to rely on evidence "reasonably believed to be relevant" to the problem being addressed. *Alameda Books*, 535 U.S. at 438. The studies upon which the City relied evaluate the secondary effects of a variety of adult businesses—a category encompassing any business that would be affected by the Ordinance—and are therefore unquestionably relevant.

The presence or absence of minimal clothing is not relevant to whether separation requirements fulfill the stated purpose of the Ordinance. This circuit recognizes that municipalities may reasonably find that separation requirements serve the interest of reducing the secondary effects of adult establishments. "Buffers" between patrons and performers prevent the exchange of money for prostitution or drug transactions and allow enforcement of "no touching" provisions, which would otherwise be virtually unenforceable. *See Colacurcio*, 163 F.3d at 554. There is no reason to believe that minimal clothing obviates the need for these measures when the atmosphere is equally charged—money exchanges and touching are no more difficult if the dancer is wearing minimal clothing than if she is partially or fully nude.[6]

The Appellants have not presented evidence sufficient to create a genuine issue of material fact as to whether the two-foot rule is designed to serve a substantial governmental

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6. The City Council was presented with a report documenting an interview with former adult dancers from another jurisdiction in which the dancers indicated that solicitations for sexual favors occurred "whether the club is nude or not" and that drugs were frequently passed during tipping.

interest in preventing the secondary effects of adult establishments. The Ordinance therefore survives the first prong of the *Renton* test.

2

Our next consideration is whether the City's two-foot rule is narrowly tailored to address the problem of secondary effects from adult entertainment. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166. The Ordinance's two-foot separation requirement is more narrow than other separation requirements that the Ninth Circuit has upheld. *See Colacurcio*, 163 F.3d at 553-54 (upholding a ten-foot separation requirement); *BSA, Inc. v. King County*, 804 F.2d 1104, 1110-11 (9th Cir. 1986) (upholding a six-foot separation requirement); *Kev*, 793 F.2d at 1061-62 (upholding a ten-foot separation requirement). These earlier cases involved nude or topless dancing, and therefore differ from the case before us. Nonetheless, they guide us in now holding that in the context of a club that features on-stage nude dancing and offstage minimally clothed dancing, the City's two-foot separation requirement is narrowly tailored to prevent the exchange of money or drugs and to allow enforcement of the "no touching" provisions.

3

Finally, we consider whether the Ordinance leaves open alternative avenues of communication. *See Ctr. for Fair Pub. Policy*, 336 F.3d at 1166. This inquiry is analogous to that in Section IV(A), *supra*, which concluded that the Ordinance is not a complete ban on protected expression. The challenged

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Ordinance leaves dancers free to convey their erotic message as long as they are two feet away from patrons. Although the message may be slightly impaired from this distance, it cannot be said that a dancer's performance "no longer conveys eroticism" from two feet away. *Dream Palace*, 384 F.3d at 1021 (internal citation and quotation omitted). Because the dancer's erotic message may still be communicated from a slight distance, the Ordinance survives this final prong of the *Renton* analysis.

As detailed above, the Ordinance's two-foot rule is narrowly tailored to address the City's concerns about the secondary effects of adult establishments and leaves alternate channels of communication open by allowing dancers to perform at a two-foot distance. The Ordinance survives intermediate scrutiny.

V

The Ordinance was thoroughly researched and narrowly tailored to combat the negative side-effects of adult businesses that the City's research identified. Regulating adult businesses will always place the City's concerns in tension with First Amendment protections. In this case, however, the City of La Habra designed an Ordinance that falls within what has previously been accepted as constitutional in this circuit, despite the minimal amount of clothing that the appellant dancers wear when performing. The Ordinance is not vague or overbroad, and the Appellants have raised no genuine issue of material fact regarding their takings or First Amendment claims. The judgment of the district court is therefore **AFFIRMED.**

Appendix A

ORDER

The court's opinion, filed January 26, 2005, is amended as follows:

The second paragraph on slip op. 1131, under heading "C", line 3: the words "leaves open" are deleted and replaced with, "does not unreasonably limit".

Slip op. 1135, first paragraph, line 2: the word "ample" shall be inserted between "open" and "alternative".

With these amendments, Judges Fisher and Tallman have voted to deny the petition for rehearing en banc and Judge Tashima so recommends. The full court has been advised of the petition for rehearing en banc. No judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED. No further petitions for rehearing or petition for rehearing en banc shall be entertained.

APPENDIX B — ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION DATED MAY 24, 2004 AND FILED MAY 25, 2004

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA SOUTHERN DIVISION

Case No. SA CV 03-911-GLT (MLGx)

BILL BADI GAMMOH, et al.,

Plaintiffs,

vs.

CITY OF LA HABRA,

Defendant.

Defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

Plaintiff Gammoh owns the Taboo Theater, an adult cabaret club featuring on-stage nude and semi-nude dancing and off-stage clothed dancing, in the Defendant City of La Habra. The Taboo is the only adult cabaret in La Habra, and has been so for many years.

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The remaining named Plaintiffs are dancers who perform a variety of nude, semi-nude, and clothed dances at Taboo, and serve non-alcoholic beverages. While performing off-stage dances such as "lap dances," the dancers typically wear minimal clothing, typically pants or shorts and a tank top or bikini top, which opaquely cover the dancers' genitalia, buttocks, and breasts.

Pursuant to a permit issued by the city, Gammoh has operated the club since 1998. Since that time, Gammoh has consistently challenged the City's regulatory ordinances in state and federal court. In April 2003, the City enacted ordinance 1626, an Adult Entertainment Ordinance defining what is appropriate within adult cabarets. Pending the outcome of this litigation, the City is not currently enforcing the Ordinance.

Plaintiffs filed a complaint alleging Sections 4, 7(F), 7(G), and 7(H) of the Ordinance[1] violate their constitutional

1. Section 4 of the ordinance defines an "adult cabaret dancer" as one who:

> performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and/or buttocks . . . .

Sections 7(F) and 7(H) of Ordinance 1626 require "adult cabaret dancers" to maintain a two-foot separation from and avoid intentional touching of patrons. Section 7(H) of the ordinance requires tips from patrons to be placed in receptacles, rather than being handed directly to the "adult cabaret dancer."

rights and rights under California law. The City timely removed to this Court in June 2003, and the Court earlier dismissed Plaintiffs' causes of action for: (1) facial overbreadth; (2) due process and equal protection; and (3) prior existing use. The City now moves for summary judgment on Plaintiffs' remaining causes of action for: (1) facial vagueness; (2) free speech and expression; (3) regulatory takings; (4) vested rights; and (5) equitable estoppel.

II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.Pro. 56(c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

In making a summary judgment determination, the Court must view the evidence presented in the light most favorable to the non-moving party, drawing "all justifiable inferences . . . in his favor." *Id.* at 255. If the non-moving party fails to present a genuine issue of material fact, the Court must grant summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

Appendix B

A. *Vagueness*

In their first cause of action, Plaintiffs allege Section 4 of Ordinance 1626, the section defining an "adult cabaret dancer," is impermissibly vague.[2] "Whether a statute, regulation, or local ordinance is unconstitutionally vague is a question of law" for the Court. *Dodger's Bar & Grill, Inc. v. Johnson County Bd. of County Comm'rs*, 32 F.3d 1436, 1443 (10th Cir. 1994); *accord U.S. v. Ninety-Five Firearms*, 28 F.3d 940, 941 (9th Cir. 1994).

A statute can be impermissibly vague for two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *United States v. Harris*, 185 F.3d

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2. The Court earlier dismissed Plaintiffs' overbreadth challenge to this section. In their opposition to Defendant's motion, Plaintiffs seek to have the Court revisit this ruling. Although procedurally improper, *see* Local Rule 7-18, the Court has reviewed and considered Plaintiffs' newly-offered arguments and evidence, which relate to the testimony of officer Clifford McPhail and the contention legitimate ballroom dancing is now taking place at Taboo.

Plaintiffs' arguments regarding Officer McPhail's testimony are misplaced, as discussed *infra*. As to ballroom dancing, even assuming ballroom dancing is now taking place at Taboo (alongside nude and semi-nude dancing), and that Ordinance 1626 bars this type of dancing, this is not substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973). The Court finds its earlier ruling remains correct and will stand.

999, 1004 (9th Cir. 1999). Because the Court earlier ruled Section 4 provides people of ordinary intelligence a reasonable opportunity to understand what conduct Ordinance 1626 prohibits,[3] Plaintiffs' remaining vagueness claim challenges whether Section 4 authorizes arbitrary and discriminatory enforcement.[4]

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3. In their opposition, Plaintiffs seek to have the Court revisit this decision. As with their attempt to revisit the overbreadth issue, this request is procedurally improper. Nevertheless, the Court has reviewed and considered Plaintiffs' newly-offered arguments and evidence. The Court's earlier ruling will stand.

4. Although this issue is a question of law for the Court, Plaintiffs' arguments rely heavily on the deposition testimony of La Habra police officer Clifford McPhail. Plaintiffs contend McPhail testified Section 4 is "incomprehensible," "very difficult to understand," and subject to widely-differing interpretations among police officers. Because McPhail cannot understand the Ordinance, Plaintiffs argue, it must authorize or encourage arbitrary or discriminatory enforcement.

The Court has reviewed Officer McPhail's testimony, and finds Plaintiffs' arguments are misplaced. While McPhail acknowledges individual words of Section 4 may be subject to diverse interpretations when taken alone and out of context, he testified Section 4, taken as a whole and in the context of an adult cabaret, was sufficiently clear. *See McPhail Depo.* at 0828-0829.

The Court will also not address Plaintiffs' continued, legally-unsupported argument Ordinance 1626 is unconstitutionally vague because the City has a history of allegedly arbitrary and discriminatory enforcement. The Court rejected this argument over six months ago, and Plaintiffs have offered no evidence or authority indicating this decision was incorrect.

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The most crucial aspect in determining if a statute encourages arbitrary and discriminatory enforcement is ensuring the La Habra City Council "establish[ed] minimal guidelines to govern law enforcement" to prevent "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citing *Smith v. Goguen*, 415 U.S. 566, 574, 575 (1974)) (internal quotation marks omitted). "[W]here First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Key, Inc. v. Kitsap County*, 793 F.2d 1053, 1057 (9th Cir. 1986) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972)). The First Amendment does not require absolute clarity, however. All that is required are "reasonably precise standards for law enforcement officials and triers of fact to follow." *Id.* (citing *Smith* at 572-73; *Grayned* at *id.*). Ordinance 1626 meets this standard.

Plaintiffs argue ordinance 1626 is similar to the ordinance struck down in *City of Chicago v. Morales*, 527 U.S. 41 (1999), which criminalized the act of loitering "with no apparent purpose." In *Morales*, the Supreme Court held the ordinance encouraged arbitrary or discriminatory enforcement because the language regarding the apparent purpose of the loiterer was inherently subjective and "'provide[d] absolute discretion to police officers to decide what activities constitute loitering.'" 527 U.S. at 61 (quoting *City of Chicago v. Morales*, 177 Ill. 2d 440, 457 (1997)).

Plaintiffs also contend Ordinance 1626 is similar to the portions of the Child Pornography Prevention Act ("CPPA") struck down in *Free Speech Coalition v. Reno*, 198 F.3d 1083

(9th Cir. 1999), *aff'd*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Ninth Circuit held the phrases "appears to be a minor" and "convey[s] the impression a depiction portrays a minor" were unconstitutionally vague because they were "highly subjective" and the CPPA contained "no explicit standard as to what the phrases mean." 198 F.3d at 1095.

Plaintiffs contend the same, or greater, level of discretion found in *Morales* and *Free Speech Coalition* is present in Ordinance 1626, especially because it contains four separate unclear phrases, i.e., "sexually-oriented," "regular basis," "substantial basis," and "focuses on or emphasizes." The Court disagrees. This language, taken together and in the context of the dancing at issue, i.e., at an adult cabaret featuring fully and semi-nude, sexually-oriented dancing, are the reason the Ordinance is not vague.

The Ordinance defines an "adult cabaret dancer" in the conjunctive, so an individual must meet five elements to fall within the definition: (1) the individual must perform at an adult cabaret; (2) the performer must perform as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer; (3) the performance must focus on or emphasize the dancer's breasts, genitals, and/or buttocks; (4) the performance must have this focus on a regular basis; and (5) the performance must have this focus on a substantial basis. This definition is a far cry from the terse and virtually unguided language struck down in *Morales* and *Free Speech Coalition*. The question of who is an "adult cabaret dancer" "will be readily answerable; to the extent that an area of doubt exists, [the Court] see[s] no reason why the ordinance[] [is] not readily subject to a narrowing construction by the state

courts." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976) (internal quotation marks omitted).

This is especially true when considering the fact the challenged language is found in the definitions in the Ordinance, rather than its prohibitory sections. Even assuming Plaintiffs' arguments regarding vagueness were correct, the Ordinance does not criminalize being an "adult cabaret dancer." It instead prohibits the affirmative act of an "adult cabaret dancer" intentionally touching a patron or coming too close to the patron during a dance, or receiving tips directly from the patron. These overt acts are not subjective or vague.

The Court finds the La Habra City Council sufficiently "establish[ed] minimal guidelines to govern law enforcement." *Kolender, supra*, 461 U.S. at 358. The enforcement of any law, statute, or ordinance" requires the exercise of some degree of police judgment." *Grayned, supra*, 408 U.S. at 114. The degree of judgment involved here is acceptable, and Plaintiffs' facial vagueness challenge fails. Defendant's motion for summary judgment on this cause of action is GRANTED.

B. *Free Speech and Expression*

In their second cause of action, Plaintiffs allege Sections 7(F), 7(G), and 7(H) of Ordinance 1626, the sections mandating a two-foot separation, no touching, and no direct tipping, violate Plaintiffs' rights to free speech and free

expression.[5] In opposing Defendant's motion, Plaintiffs contend these sections do not stand up to either strict or intermediate scrutiny.

The parties agree the three-step framework set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), applies to Ordinance 1626. Under *Renton*, the Court must first determine whether the Ordinance is a complete ban on protected expression. *Id.* at 46. Second, the Court must determine whether the Ordinance is content-neutral or content-based. If the Ordinance is aimed at the secondary effects the speech has on the surrounding community, rather than the content of the speech, it is properly classified as content-neutral, and intermediate scrutiny applies.[6] *Id.* at 47. The third inquiry, applying intermediate scrutiny, is to determine whether the Ordinance is designed to serve a substantial government-interest and reasonable alternative avenues of communication remain available. *Id.* at 50.

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5. Although the parties do not address the issue, the cases discussed below indicate this analysis is a question of law proper for the Court to decide.

6. If the Ordinance is a complete ban on protected expression or is aimed at the content of speech, rather than secondary effects, the Court applies strict scrutiny, i.e., the law must be narrowly tailored to advance a compelling government interest. *Renton*, 475 U.S. at 46-47.

Appendix B

1. *Ordinance 1626 is not a Complete Ban on Protected Expression*

Plaintiffs argue the Court should apply strict scrutiny to its review of the Ordinance because the two-foot separation and no touching restrictions is a complete ban on protected, expressive dance. Citing the declaration of their expert, Dr. Judith Hanna, Plaintiffs argue "the expression inherent in the performance . . . cannot be communicated if the dancers must remain at least two feet from the patrons." *Opposition* at 20:6-8. This argument fails for three reasons.

First, the Ordinance is a classic time, place, and manner restriction. The Ordinance does not ban nude dancing, semi-nude dancing, or even fully-clothed dancing at Taboo. It instead regulates the *manner* of such dancing.

Second, Plaintiffs have no protected First Amendment right to touch patrons in the adult cabaret context. While nude, semi-nude, and even sexually-oriented dancing may be protected under the First Amendment,[7] Plaintiffs point to no case establishing touching a patron is a necessary part of any protected expression in an adult cabaret, whether the dancer is clothed or not. The Court finds Dr. Hanna's declaration is insufficient to establish this point, as a matter of law, because separation requirements between patrons and dancers have been uniformly upheld in the Ninth Circuit.

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7. The Supreme Court has recognized nude and semi-nude dancing "is expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566 (1991).

See Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998) (upholding a ten-foot separation requirement); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986) (upholding six-foot separation requirement); *Key, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (upholding ten-foot separation requirement}; *Nightlife Partners, Ltd. v. City of Beverly Hills*, 304 F. Supp. 2d 1208 (C.D. Cal. 2004) (upholding six-foot separation requirement). "While the dancer's erotic message may be slightly less effective from [two] feet, the ability to engage in the protected expression is not significantly impaired." *Kev*, 793 F.2d at 1061.

Third, even if Plaintiffs had a First Amendment right to touch patrons, Dr. Hanna does not state the dancers will be unable to express themselves if Ordinance 1626 is in place. Dr. Hanna instead posits the separation requirements "will *seriously impair* the dancer's artistic expression and communication." *March 18, 2004 Hanna Decl.* at 19 (emphasis added).

Ordinance 1626 is not a complete ban on protected expression. The Court will not apply strict scrutiny on this basis.

2. *The Content-Based Restrictions of Ordinance 1626 do not Warrant Strict Scrutiny*

Plaintiffs next contend strict scrutiny applies to Ordinance 1626 because it is content-based and does not regulate sexual or pornographic speech. These arguments fail.

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Plaintiffs correctly note Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002), observes that virtually all regulation of adult business is content-based.[8] As the-Ninth Circuit recently explained, this does not necessarily mean strict scrutiny applies to adult business regulations. *See Center For Fair Public Policy*, 336 F.3d at 1164 ("Because the statute is content based, [plaintiff] argues that strict scrutiny should apply. Such argument is misplaced."). Intermediate scrutiny applies if the speech is sexual or pornographic in nature and the primary motivation behind the regulation is to regulate secondary effects. *Id.* (citing *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring)).

Plaintiffs contend the clothed dancing regulated by the Ordinance cannot be considered sexual or pornographic. It is undisputed this dancing is not pornographic, but Plaintiffs overlook the context in arguing the dancing is not sexual.

The Court recognizes "it is unclear how 'sexual' in nature regulated speech must be to warrant the *Renton/Alameda Books* analysis." *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 414 (7th Cir. 2004). However, the dancing at issue does not take place in a well-lit recital hall or in a classroom, or even at a club featuring only clothed dancing (such as a

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8. The Court in *Alameda* was split and without a majority opinion. Justice Kennedy concurred in the judgment of the plurality opinion, and "[b]ecause his concurrence is the narrowest opinion joining in the judgment of the Court, [it] may be regarded as the controlling opinion." *Center For Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153, 1161 (9th Cir. 2003) (citing *Marks v. United States*, 430 U.S. 188, 193 (1976)).

typical nightclub). It instead takes place in an establishment undisputedly featuring nude and semi-nude dancing, which Plaintiffs admit focus on the genitals, buttocks and breasts of the dancers. This nude and semi-nude-dancing is unquestionably sexual in nature. After the dancers finish their nude and semi-nude dances, they put on a small amount of clothing, walk off-stage and begin the clothed dancing, which itself can feature the dancer vigorously rubbing herself on the patron. As Plaintiffs expert admits, the purpose of this clothed dancing is "to evolve a fantasy of romance" as a "metaphoric sign of attraction and Eros." *Hanna Decl.* at 10. In this context, the clothed dancing at issue is sexual in nature.

"Whatever the label, *Renton*'s second step is best conceived as an inquiry into the purpose behind an ordinance rather than an evaluation of an ordinance's form." *R.V.S.*, *supra*, 361 F.3d at 407. This inquiry is "separate and independent from the inquiry into whether the statute is designed to serve a substantial government interest," which is discussed in Section II.B.3, *infra*. *Center For Fair Public Policy, supra*, 336 F.3d at 1166.

Although Plaintiffs do not directly challenge the motivation behind the Ordinance,[9] the Court has reviewed the record and finds the "objective indicators of intent," such as the face of the statute and its stated purpose, *Colacurcio*,

9. Concerning their regulatory takings claim, discussed *infra*, Plaintiffs state they "do not contest the legitimacy of the objectives identified in the City's ordinance, but only challenge whether the prohibitions on touching and proximity applicable to clothed dancers substantially further those objectives." *Opposition* at 32:15-18.

supra, 163 F.3d at 552, indicate the primary motivation behind the Ordinance is to ameliorate secondary effects. The motivation behind the enactment of Ordinance 1626 is proper. Intermediate scrutiny applies, and the Court moves to the third *Renton* inquiry.

3. *Ordinance 1626 Survives Intermediate Scrutiny under Renton*

To survive intermediate scrutiny under *Renton*, the Ordinance must: (1) be designed to serve a substantial government interest; (2) be narrowly tailored to serve that interest; and (3) leave available reasonable alternative avenues of communication. *Center For Fair Public Policy*, *supra*, 336 F.3d at 1166 (citing *Renton*, 475 U.S. at 50; *Colacurcio*, 163 F.3d at 551). The regulation of secondary effects is a substantial government interest, *id.* ("[A] state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial"), so the first element is met.

Plaintiffs contend the Ordinance is neither narrowly tailored to serve the City's interest in regulating secondary effects, nor does it in fact serve that interest. In support of this contention, Plaintiffs first argue the City relied on "shoddy" data and reasoning in enacting the Ordinance, and the Supreme Court has held a municipality may not rely on "shoddy" data and reasoning for demonstrating a connection between speech and a substantial, independent government interest. *See Alameda Books*, 535 U.S. at 438 (plurality opinion).

> The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in *Renton*. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Id. at 438-39 (plurality-opinion).

Justice Kennedy was equally clear in his concurrence that the City must be given broad latitude to experiment with new regulations, and "at least at the outset, . . . very little evidence is required." *Id.* at 451 (Kennedy, J., concurring). "As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners." *Id.* at 452 (Kennedy, J., concurring).

To demonstrate the City relied on "shoddy" data and reasoning, Plaintiffs offer the studies of their experts. Plaintiffs contend these studies "establish[] that the City's evidence does not support its rationale . . . and disput[e] the City's factual findings," thereby precluding summary judgment. *Opposition* at 25: 2-5. This argument was specifically rejected in *G.M. Enterprises, Inc. v. Town of St. Joseph, Wis.*; 350 F.3d 631, 639-40 (7th Cir. 2003), which the Court finds persuasive.

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In *G.M. Enterprises*, the owner of an adult cabaret challenged a city zoning ordinance, contending the city's evidence regarding secondary effects was inadequate. To support this argument, the plaintiffs offered evidence similar to what Plaintiffs present in this case, including: (1) a study by Dr. Linz, one of Plaintiffs' experts here, indicating the studies relied upon by the city were "fundamentally unsound" and methodologically flawed; (2) evidence indicating property values near the cabaret increased over time; and (3) evidence indicating greater police activity at non-adult clubs than at adult cabarets. *Id.* at 635-36.

The Seventh Circuit affirmed the district court's grant of summary judgment in favor of the city, stating:

> Although this evidence shows that the [city] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the Board's legislative process . . . . *Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence 'reasonably believed to be relevant to the problem' addressed.

Id. at 639-40 (citing *Renton*, 475 U.S. at 51-52). The case law does not require the exacting evidentiary match Plaintiffs urge the Court to adopt.

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In enacting Ordinance 1626, the City relied on a considerable amount of relevant evidence, including, but not limited to: (1) studies on secondary effects promulgated by at least 16 other municipalities; (2) at least 39 cases dealing with the regulation of adult businesses, including cases dealing with separation requirements; (3) reports and studies on HIV/AIDS and other sexually transmitted diseases; and (4) reports and studies on the effects of pornography. *See* Ordinance 1626, Section 1. At the time of enactment, this information was 'reasonably believed to be relevant to the problem' addressed in the challenged sections of the ordinance. The City knows the streets of La Habra better than the Court does, and the Court will, not second-guess the City's fact-bound assessments.

Plaintiffs argue Ordinance 1626 does not leave available reasonable alternative avenues of communication. A regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate interests, but it need not be the least restrictive or least intrusive means of doing so. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

While the reports of Plaintiffs' experts emphasize the importance of touch to erotic dancing, Plaintiffs' arguments on this point ultimately fail because, as noted above, stricter separation requirements have been uniformly upheld in the Ninth Circuit. *See Colacurcio*, *supra*, 163 F.3d 545 (upholding a ten-foot separation requirement); *BSA*, *supra*, 804 F.2d 1104 (upholding six-foot separation requirement); *Kev*, *supra*, 793 F.2d 1053 (upholding ten-foot separation requirement); *Nightlife Partners*, *supra*, 304 F. Supp. 2d 1208

(upholding six-foot separation requirement). The Court will follow this precedent.

Under the *Renton* framework, Sections 7(F), 7(G), and 7(H) of Ordinance 1626 do not violate Plaintiffs' rights to free speech and free expression. Defendant's motion for summary judgment on this cause of action is GRANTED.

C. *Regulatory Takings*

In their third cause of action, Plaintiffs allege the challenged portions of Ordinance 1626 effect an impermissible regulatory taking because they do not "substantially advance[] legitimate public interests." *See Dolan v. City. of Tigard*, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'") (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

An ordinance substantially advances a legitimate government interest if a "reasonable relationship exists between this regulatory action and the public purpose it is meant to serve." *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 968 (9th Cir. 2003) (citing *Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030, 1041 (9th Cir. 2000)). As opposed to the analysis under *Renton/Alameda Books*, *supra*, which focused on the reasonable belief of the City, this analysis requires a determination of whether the Ordinance actually does further the City's purpose of

ameliorating secondary effects.[10] *See Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 855 (9th Cir. 2004); *see also Cayetano* at *id.* ("Whether Act 257's rent cap is reasonably related to its objective of lowering fuel prices certainly depends on whether it will in fact lead to lower fuel prices.").

Defendant contends there is a "simple, direct and obvious 'reasonable relationship'" between the challenged sections of the Ordinance and the City's goals of preventing secondary effects, namely the prevention of prostitution, drug transactions and the transmission of sexually transmitted diseases, each of which has been discussed and upheld in other adult-business regulation cases. Plaintiffs argue the reports of their experts, which question whether the clothed dancing at issue causes secondary effects, create triable issues precluding summary judgment.

The question of whether an ordinance substantially advances a legitimate government interest is a mixed question of law and fact generally appropriate for the Court to decide on summary judgment. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999) (plurality opinion); *Buckles v. King County*, 191 F.3d 1127, 1140-42 (9th Cir. 1999). However, in *Del Monte Dunes*, the Supreme Court held the question of whether the City's regulatory decision bore a reasonable relationship to its proffered justifications, when viewed in light of the context and the protracted history between the parties, was "essentially

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10. Because of this difference between these two analyses, the Court's ruling on the Plaintiffs' free speech cause of action does not directly impact the ruling on this cause of action.

fact-bound [in] nature," and proper to submit to the jury. 526 U.S. at 721 (plurality opinion) (internal quotation marks omitted). The plurality opinion in *Del Monte Dunes*, however, did not require this issue to go to the jury, but only that it was proper under the specific facts of that case. *Del Monte Dunes* does lot appear to overrule the line of cases holding this issue is proper for the Court to decide. *See, e.g., New Port Largo,, Inc. v. Monroe County*, 95 F.3d 1084, 1092 (11th Cir. 1996) (whether regulatory taking occurred is an issue for the court); *Mid Gulf, Inc. v. Bishop*, 792 F. Supp. 1205, 1213-1214, 1215 (D.Kan. 1992) (whether city's regulations unreasonable and a taking a question of law for the court); *Gissel v. Kenmare Township*, 512 N.W.2d 470, 474 (N.D. 1994).

The Court finds the factual circumstances in this case do not warrant submission of this question to the jury. The "reasonable relationship" here is easily found. As many cases have discussed, the link between crime and adult cabarets is well-recognized. The criminal link to contact between dancers and patrons at adult cabarets is also well-recognized. These criminal links are not negated because the dancers wear minimal clothing. The context of this case is an adult cabaret, and the dancers perform in this cabaret.

Plaintiffs' regulatory takings cause of action fails. Defendant's motion for summary judgment on this cause of action is GRANTED.

D. *Vested Rights*

In their fourth cause of action, Plaintiffs allege they have "vested rights" in activity now deemed illegal by Ordinance

1626. As the Ninth Circuit has recognized, a "vested rights" cause of action is governed by California law. *Lakeview Development Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1294-96 (9th Cir. 1990).

The vested rights doctrine is "predicated upon estoppel of the governing body," *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 793 (1976), and is to be applied only where justice and fairness require it, *Raley v. California Tahoe Regional Planning Agency*, 68 Cal. App. 3d 965, 975 (1977). "In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use." *Lakeview Development Corp.*, *supra*, 915 F.2d at 1295. "[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." *Avco, supra*, 17 Cal. 3d at 791 (citations omitted). The rights which may "vest" through reliance on a government permit would ordinarily be no greater than those specifically granted by the permit itself. *Id.* at 793.

As the Court noted in its earlier ruling on Defendant's motion to dismiss the Second Amended Complaint, Plaintiffs' vested rights claim rests on the assumption their normal operating conditions and practices, which were legal under prior regulations, can form the basis of a vested rights claim.

Plaintiffs cite no California authority supporting this position, which appears contrary to established California law.

For example, while a developer may obtain a vested right to complete an apartment building after reasonable reliance on the issuance of a permit, he does not obtain a vested right to rent the apartments free from later-enacted rent controls. *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal. 3d 858, 865-66 (1984), *overruled on other grounds* by *City of West Hollywood v. Beverly Towers, Inc.*, 52 Cal. 3d 1184 (1991). The right to pursue a lawful business or occupation is a fundamental right, but there is no vested right to conduct business free of reasonable governmental rules and regulations. *American National Ins. Co. v. Fair Employment & Housing Com.*, 32 Cal. 3d 603, 607 (1982) (citing *Northern Inyo Hospital v. Fair Employment Practices Com.*, 38 Cal. App. 3d 14, 23 (1974)).

Under this authority, if Plaintiffs have a vested right at all, it appears to be only in the continued operation of the club as an adult cabaret. Plaintiffs contend 90-95% of the dancers' income at Taboo is derived from off-stage dancing that would be banned under Ordinance 1626, and the club will be forced to close if the Ordinance is enforced. To support this contention, Plaintiffs offer the deposition testimony of Plaintiff Stacy Joy, a dancer, and a declaration from Plaintiff Gammoh.

To create a triable issue sufficient to prevent summary judgment, Plaintiffs' evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson, supra*, 477 U.S. at 248. Evidence that is "merely

colorable" or of insignificant probative value cannot defeat summary judgment. *Id.* at 249-50. Even when viewed in the light most favorable to Plaintiffs, this evidence is speculative, unsupported, and insufficient to create a triable issue.

Despite requests by Defendant, Plaintiffs have uniformly refused to provide Defendant with any evidentiary proof of their income at Taboo. Plaintiffs similarly offer the Court no evidentiary support for this income contention other than Joy's unsupported testimony. Even assuming the truth of Joy's claim that 95% of her income is derived from off-stage dancing, and assuming it fairly represented all of the dancers at Taboo, this evidence is not probative because the Ordinance does not ban off-stage dancing. It merely regulates the manner of that dancing.

Gammoh's declaration is also insufficient. In his declaration, Gammoh speculates that, if off-stage dances were not allowed, "no doubt most of the dancers . . . would leave." *Gammoh Decl.* at ¶ 10. While Plaintiffs' counsel characterizes Gammoh's declaration as stating the Taboo "will be forced to close" if the Ordinance is enforced, Gammoh's declaration actually states the club "would have a difficult time surviving" if off-stage dancing is banned. *Id.* Again, Ordinance 1626 does not ban off-stage dancing.

There is no competent, admissible evidence before the Court indicating the club will be forced to close if the Ordinance is enforced. Defendant's motion for summary judgment on this cause of action is GRANTED.

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E. *Equitable Estoppel*

In their sixth cause of action,[11] Plaintiffs allege the City is equitably estopped from enforcing Ordinance 1626. Under California law, the doctrine of equitable estoppel has four elements: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct will be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. *Driscoll v. City of Los Angeles*, 67 Cal. 2d 297, 305 (1967) (citations omitted).

There is a higher standard to establish equitable estoppel against a public entity. In addition to the four elements above, "in the considered view of the court of equity, the injustice which would result from a failure to uphold an estoppel [must be] of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 496-97 (1970). Estoppel will not stand against a government agency "if the result will be the frustration of a strong public policy." *In re Monigold*, 205 Cal. App. 3d 1224, 1228 (1988). The Court earlier ruled Plaintiffs had sufficiently alleged the elements of an equitable estoppel claim against the City.

In its current motion, Defendant challenges Plaintiffs' proof on many elements of their claim. In opposing Defendant's motion, Plaintiffs do not join issue with most

11. The numbering of Plaintiffs' causes of action is inconsistent due to the Court's earlier dismissal of certain causes of action.

of Defendant's arguments, and instead rely on the allegations made in the Second Amended Complaint.[12] This is insufficient to defeat summary judgment.

On a summary judgment motion on a claim for which the moving party does not bear the burden of proof, "the burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court– that there is an absence of evidence to support the nonmoving party's case." *Celotex, supra*, 477 U.S. at 325. Plaintiffs have failed to make a showing sufficient to establish the existence of essential elements of their equitable estoppel claim, and Defendant is entitled to judgment as a matter of law. *See id.* at 322-23. Defendant's motion for summary judgment on this cause of action is GRANTED.

III. DISPOSITION

Defendant City of La Habra's motion for summary judgment is GRANTED.

DATED: May 24, 2004

s/ Gary L. Taylor

GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

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12. Plaintiffs only join issue with the City in discussing the final element, whether the application of estoppel here would frustrate the City's interest in regulating secondary effects.

APPENDIX C — ORDINANCE N0. 1626

ORDINANCE NO. 1626

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF LA HABRA AMENDING CHAPTER 18.60 OF TITLE 18 OF THE LA HABRA MUNICIPAL CODE TO PROVIDE CERTAIN CLARIFICATION REGARDING THE REGULATIONS OF ADULT USE ESTABLISHMENTS

The City Council of the City of La Habra does hereby ordain as follows:

SECTION 1. FINDINGS. The City Council of the City of La Habra hereby finds, determines, and declares that:

A. The City Council finds that it is necessary and appropriate to clarify certain restrictions relating to adult use entertainment venues regulated by Chapter 18.60 of the La Habra Municipal Code in light of the Court of Appeal's most recent unpublished opinion rendered in *City of La Habra v. Bill Badi Gammoh,* Court of Appeal, Fourth Appellate District, Division Three, Case Nos. G026893, G02774. The City Council in its prior establishment of the prohibitions on adult uses within residential zones declared this was necessary for the protection of the welfare of the people, as a result of the potential negative secondary effects of adult businesses, including crime, the protection of the city's retail trade, the prevention of blight in neighborhoods and the maintenance of property values, protecting and preserving the quality of the city's neighborhoods and the city's commercial districts, the protection of the city's quality of life, the increased threat of the spread of sexually transmitted

diseases, and the protection of the peace, welfare and privacy of persons who patronize adult businesses. The City Council reaffirms these findings. The City Council also declared its reasonable basis to believe that the negative secondary effects generated by adult entertainment facilities and the corresponding need for operational criteria to reduce these judicially recognized secondary effects in its adoption of Ordinance Nos. 1539 and 1540. The City Council does hereby reaffirm those findings.

B. The City Council, in adopting this ordinance, takes legislative notice of the existence and content of the detailed studies prepared by other jurisdictions regarding the social and economic secondary effects on persons and properties surrounding established adult use facilities.

C. The City Council, in adopting this Ordinance, takes legislative notice of the existence and content of the following studies concerning the adverse secondary effects of adult businesses in other cities: Garden Grove, California (1991); Tucson, Arizona (1990); Seattle, Washington, Department of Construction and Land Use (1989); Austin, Texas, Office of Land Development Services (1986); Oklahoma City, Oklahoma (1986); Indianapolis, Indiana, Department of Metropolitan Development (1984); Houston, Texas, City Council Report (1997); Beaumont, Texas (1982); Minneapolis, Minnesota, Minnesota Crime Prevention Center, Inc. (1980); Phoenix, Arizona (1979); Los Angeles, California, Department of City Planning (1977); Amarillo, Texas, Planning Department (1977); Cleveland, Ohio (1977); New York, New York (1994); Newport News, Virginia (1996); New York, New York, Times Square Business

Improvement District (1994); and Whittier, California (1978). The City Council finds that these studies are relevant to the problems addressed by the City in enacting this Ordinance to regulate the adverse secondary effects of adult businesses and more specifically finds that these studies provide convincing evidence that:

1. There is substantial evidence that an increase in crime tends to accompany, concentrate around, and be aggravated by adult businesses, including but not limited to an increase in the crimes of narcotics distribution and use, prostitution, pandering, and violence against persons and property. The studies from other cities establish by convincing evidence that adult businesses that are not regulated as to operating standards often have a deleterious effect on nearby businesses and residential areas, causing, among other adverse secondary effects, an increase in crime and a decrease in property values.

2. Regulations for adult businesses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather that waiting for problems to be created.

D. In developing this Ordinance, the City Council is mindful of legal principles relating to regulation of adult businesses, and the City Council does not intend to suppress or infringe upon any expressive activities protected by the First Amendment of the United States and California Constitutions but instead desires to enact reasonable time, place, and manner regulations that address the adverse secondary effects of adult businesses. The City Council has considered decisions of the United States Supreme Court regarding local

regulation of adult businesses, including but not limited to: *City of Erie v. Pap's A.M. ("Kandyland')*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *and Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); decisions of the United Stated Court of Appeals for the Ninth Circuit, including but not limited to: *Diamond v. City of Taft*, 215 F.3d 1052 (9th Cir. 2000), *cert. denied* 531 U.S. 1072 (2001); *Isbell v. City of San Diego*, 258 F.3d 1108 (9th Cir. 2001); *Young v. City of Simi Yalley*, 216 F.3d 807 (9th Cir. 2000), *cert. denied* 531 U.S. 1104 (2001); *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000), *cert. denied* 531 U.S. 1191 (2001); *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted* 121 S.Ct. 1223 (2001); *Baby Tam & Co., Inc. v. City of Las Vegas ("Baby Tam I')*, 154 F.3d 1097 (9th Cir. 1998); *Baby Tam & Co., Inc. v. City of Las Vegas ("Baby Tam II');* 199 F.3d 1111 (9th Cir. 2000); *Baby Tam & Co., Inc. v. City of Las Vegas ("Baby Tam III")*, 247 F.3d 1003 (9th Cir. 2001); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied* 511 U.S. 1030 (1994); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998), *cert. denied* 529 U.S. 1053 (2000); several California cases, including but not limited to: *Tily B., Inc. v. City of Newport Beach*, 69 Cal.App.4th 1 (1998); *City of National City v. Wiener*, 3 Cal.4th 832 (1992), *cert. denied* 510 U.S. 824; *People v. Superior Court (Lucero)* 49 Cal.3d

14 (1989); and *City of Vallejo v. Adult Books,* 167 Cal.App.3d 1169 (1985), *cert. denied* 475 U.S. 1064 (1986); and other federal cases, including but not limited to: *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248 (5th Cir. 1995); *Mitchell v. Commission on Adult Entertainment,* 10 F.3d 123 (3rd Cir. 1993); *Lakeland Lounge v. City of Jackson,* 973 F.2d 1255 (5th Cir. 1992), *cert. denied* 507 U.S. 1030 (1993); *International Eateries v. Broward County,* 941 F.2d 1157 (11th Cir. 1991), *cert. denied* 503 U.S. 920 (1992); and *Star Satellite, Inc. v. City of Biloxi,* 779 F.2d 1074 (5th Cir. 1986).

E. The City Council further finds the following, based in part upon its understanding of the documents, including but not limited to the declarations of police officers in other jurisdictions setting forth their experiences, and judicial decisions in the public record:

1. Evidence indicates that some dancers, models, entertainers, performers, and other persons who publicly perform specified sexual activities or publicly display specified anatomical areas in adult businesses (collectively referred to as "performers") have been found to engage in sexual activities with patrons of adult businesses on the site of the adult business.

2. Evidence has demonstrated that performers employed by adult businesses have been found to offer and provide private shows to patrons who, for a price, are permitted to observe and participate with the performers in live sex shows.

3. Evidence indicates that performers at adult businesses have been found to engage in acts of prostitution with patrons of the establishment.

4. Evidence indicates that fully enclosed booths, individual viewing areas, as well as small rooms whose interiors cannot be seen from public areas of the establishment regularly have been found to be used as locations for engaging in unlawful sexual activity.

5. As a result of the above and the increase in incidents of HIV, AIDS, Hepatitis B and Hepatitis C which are sexually transmitted or blood borne diseases, the City has a substantial interest in adopting regulations that will reduce the possibility for the occurrence of prostitution and unlawful sex acts at adult businesses in order to protect the health, safety, and well-being of its citizens. The City finds this is relevant to the experience of La Habra and the need to regulate the secondary effects of adult businesses within the community.

6. The public health, safety, welfare, and morals of all persons in the City must be protected by the establishment of standards to diminish the possibility of infection of contagious diseases.

F. The City Council is cognizant of the specific danger from the sexually transmitted disease AIDS, which is currently irreversible and fatal. The City Council takes legislative notice that according to statistics provided by the Los Angeles County Health Department, in 1998 1,624 cases of AIDS were diagnosed in Los Angeles County and 184 AIDS-related deaths were reported. According to the most recent statistics available for 1999, 464 cases of AIDS were diagnosed in Los Angeles County between January 1, 1999 and June 30, 1999, and 42 AIDS-related deaths were reported for that same period. Further, the City Council takes legislative notice of

the County of Orange Communicable Disease Summary 1998, County of Orange Health Care Agency, issued January 2000 ("Communicable Disease Summary"). The Communicable Disease Summary states that 5,149 cases of AIDS were reported in Orange County between 1982 and 1998. In 1998, 305 cases of AIDS were reported in Orange County, an 8% increase over the 283 reported cases in 1997. As of December 1998, an estimated 2,345 residents of Orange County were living with AIDS, over double the number six years prior. As of December 2000, an estimated 5,700 Orange County residents were living with HIV or AIDS. The City also takes legislative notice of the AIDS Surveillance Report dated July 31, 2001 by the County of San Diego Health and Human Services Agency, Division of AIDS and Community Epidemiology ("AIDS Surveillance Report") and the report entitled San Diego County HIV/AIDS Status dated June 2000, also by the County of San Diego Health and Human Services Agency ("AIDS Status Report"). According to the AIDS Surveillance Report, 10,876 AIDS cases were reported throughout the County since 1981 through July 2001, 150 of which were reported in 2001 and 420 of which were reported in 2000.

G. The City is also concerned with preventing the spread of other sexually transmitted diseases such as syphilis, gonorrhea, chlamydia, hepatitis B, and hepatitis C. The Communicable Disease Summary further indicates that between 1994 and 1998, 211 cases of syphilis were reported, 3,094 cases of gonorrhea were reported, and 17,349 cases of chlamydia were reported. The City also takes legislative notice of the STD Fact Sheet of 2000 by the County of San Diego Health and Human Services Agency ("STD Fact

Sheet") and the Sexually Transmitted Diseases Annual Summary, San Diego County, 1993-1994, by the Sexually Transmitted Disease Control Program, dated December 1995 ("STD Annual Summary"). According to the STD Fact Sheet and STD Annual Summary, 1,109 cases of syphilis were reported throughout the County between 1990 and 2000, 27 of which were reported in 2000. With respect to gonorrhea, 27,890 cases of gonorrhea were reported between 1990 and 2000, 1,797 of which were reported in 2000. The number of cases of chlamydia reported within the County dramatically exceeds the number of reported cases of syphilis acid gonorrhea: 74,079 cases were reported between 1990 and 2000, 8,637 of which were reported in 2000. It should also be noted that according to the AIDS Status Report, numerous studies have shown that sexually transmitted diseases such as syphilis, gonorrhea and chlamydia facilitate the transmission of HIV.

The City Council has a reasonable basis to believe that the experiences of Los Angeles, Orange and San Diego Counties as to these sexually transmitted or blood borne diseases are relevant to the experiences of La Habra.

H. The City Council recognizes the possible harmful effects on children and minors exposed to the effects of adult businesses and recognizes the need to enact regulations which will minimize and/or eliminate such exposure. The City Council takes legislative notice of the Penal Code provisions authorizing local governments to regulate matters that are harmful to minors (*i.e.*, Penal Code '313 *et seq.)*. The City Council further takes legislative notice of the cases that recognize that protection of minors from sexually explicit

materials is a compelling government interest, including *Crawford v. Lungren,* 96 F.3d 380 (9th Cir. 1996), *cert. denied* 520 U.S. 1117 (1997) and *Berry v. City of Santa Barbara, 40* Cal.App.4th 1075 (1995).

I. The City Council also finds the establishment of operational standards for adult businesses is a legitimate and reasonable means of ensuring that:

1. Operators of and performers at adult businesses comply with the reasonable regulations of the Code;

2. The recognized adverse secondary impacts of a proposed adult business are mitigated; and

3. Adult business operators have specific guidelines with respect to the manner in which they can operate an adult business.

J. While the City Council desires to protect the rights conferred by the United States Constitution to adult businesses, it does so in a manner that ensures the continued and orderly operation and diminishes, to the greatest extent feasible, those undesirable adverse secondary effects which the above mentioned studies have shown to be associated with the operation of adult businesses.

K. Operating standards are a legitimate and reasonable means of ensuring that adult businesses are conducted in a manner so as to minimize their adverse secondary effects and to help assure that such operators and businesses comply with reasonable regulations related to such requirements to

minimize and control problems associated with such businesses and thereby protect the health, safety, and welfare of La Habra residents, protect citizens from increased crime, preserve the quality of life, preserve property values and the character of surrounding neighborhoods and businesses, and deter the spread of urban blight. The operational requirements contained in this Ordinance do not unreasonably restrict the establishment or operation of constitutionally protected adult businesses in the City of La Habra.

L. The City Council, in adopting operational standards, recognizes that these standards do not preclude reasonable alternative avenues of communication. The City Council takes note of the proliferation of adult material on the Internet, satellite television, direct television, CDs, DVDs, and that these various media provide alternative avenues of communication. The City Council also considers and relies on published decisions examining the proliferation of communications on the Internet. *(Reno v. American Civil Liberties Union,* 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) [the principle channel through which many Americans now transmit and receive sexually explicit communication is the Internet]; *Anheuser-Busch v. Schmoke,* 101 F.3d 325, 329 (4th Cir. 1996), *cert. denied* 520 U.S. 1204 (1997) [the Fourth Circuit rejected a First Amendment challenge to a Baltimore ordinance restricting alcohol advertisements on billboards acknowledging that the Internet is one available channel of communication]; *U.S. v. Hockings,* 129 F.3d 1069 (9th Cir. 1997); *see also U.S. v. Thomas*, 74 F.3d 701 (6th Cir. 1996), *cert. denied* 519 U.S. 820 [recognizing the Internet as a medium for transmission of sexually explicit material in the context of obscenity

prosecutions].) The emergence of the Internet brings with it a virtually unlimited additional source of adult oriented sexual materials available to interested persons in every community with a mere keystroke. An adult business no longer has to be "actually" physically located in a city to be available in the community.

M. The City Council has also determined that a closing hours requirement promotes the reduction of deleterious secondary effects from adult facilities and reasonably relies on prior court decisions on the need for closing hours including: *Mitchell v. Comm. on Adult Entertainment,* 10 F.3d 123, 131-139 (3rd Cir. 1993); *Lady J Lingerie, Inc. v. City of Jacksonville,* 973 F.Supp. 1428 (M.D. Fla. 1997) and *Lady J Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir. 1999); and *City of Colorado Springs v. 2354 Inc.,* 896 P.2d 272 (1995).

N. The City Council of the City of La Habra has also determined that locational criteria alone do not adequately protect the health, safety, and general welfare of the citizens of the City of La Habra and thus that certain requirements with respect to the operation of adult businesses are in the public interest. In addition to the findings in studies conducted in other cities regarding increases in crime rates and blighting of areas in which such businesses are located, the City Council also takes legislative notice of the facts recited in the case of *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir. 1986), *Colacurcio v. City of Kent,* 163 F.3d 545 (9th Cir. 1998), and *Tily B.; Inc. v. City of Newport Beach* (1999) 69 Cal.App.4th 1, regarding how live adult entertainment facilities result in secondary effects such as

prostitution, drug dealing, and other law enforcement problems.

O. In recognition of these negative secondary effects generated by live adult entertainment, a number of courts have upheld- distance limitations between performers and patrons, prohibitions against physical contact between performers and patrons, and direct payment and receipt of monies between performers and patrons at adult businesses that provide live entertainment, including, but not limited to: *Tily B., Inc. v. City of Newport Beach* (1999) 69 Cal.App.4th 1; *Colacurcio v. City of Kent,* 163 F.3d 545 (9th Cir. 1998); *BSA, Inc. v. King County, 804* F.2d 1104, 1110-11 (9th Cir. 1986); *Kev, Inc. v. Kitsap County,* 793 F.2d 1053 (9th Cir. 1986); *DLS Inc. v. City of Chattanooga,* 894 F. Supp. 1140 (E.D. Tenn. 1995); *Parker v. Whitfield County,* 463 S.E.2d 116 (Ga. 1995); and *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248 (5th Cir. 1996).

P. The City Council believes that prohibiting physical contact between performers and patrons at adult businesses, requiring separate entrances for performers from those used for patrons, requiring separate restrooms for opposite sexes, and prohibiting performers from soliciting payment from patrons, are a reasonable and effective means of addressing the legitimate governmental interests of preventing prostitution; the spread of sexually transmitted diseases, and drug transactions.

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Q. In considering appropriate operational regulations for adult businesses, the City Council finds that:

1. Preventing the direct exchange of money between performers and patrons also reduces the likelihood of drug and sex transactions occurring in adult businesses.

2. Requiring separations between performers and patrons reduces the likelihood that such persons will negotiate narcotics sales and/or transact sexual favors within adult businesses.

3. Enclosed or concealed adult booths and dimly-lit areas within adult businesses greatly increase the potential for misuse of the premises, including unlawful conduct of a type which facilitates transmission of disease. Requiring all indoor areas to be open to view by management at all times and adequate lighting to be provided reduces the opportunity for, and therefore the incidence of illegal conduct within adult businesses, and further facilitates the inspection of the interior of the premises thereof by law enforcement personnel.

(a) The City Council recognizes and relies on the findings set forth in the 1986 Attorney General's Report on Pornography in support of this Ordinance including, but not limited to, its recommendations that local governments ban certain features of video booths that facilitate carnal sexual encounters. A copy of the Attorney General's Report on Pornography is available for public review at the City Clerk's office.

(b) With respect to booths, these findings include the following: The inside walls of the booth are typically covered with graffiti and messages, usually of a sexual nature and consisting of telephone numbers, names, requests and offers for sex acts, anatomical descriptions, and sketches. Some booths also contain a chart used as an appointment schedule that is utilized to schedule appointments for sex acts that take place in that particular booth. In some instances, this arrangement has been used for the solicitation of prostitutes. Many of these booths are equipped with a hole in the side wall between the booths to allow patrons to engage in anonymous sex including both oral and anal sex acts. Inside the booths, the floors and walls are often wet and sticky with liquid or viscous substances, including semen, urine, feces, used prophylactics, gels, saliva, or alcoholic beverages. The City concludes, based in part on the description of the illicit sexual activity as noted within the Attorney General's Report, that the presence of closed doors is likely to lead to the above described secondary effects.

(c) The City Council finds that requiring that adult booths/individual viewing areas ("adult booths") be configured in such a manner so that there is an unobstructed view by the manager and prohibiting closed, concealed, or obstructed adult booths that are occupied by no more than one person at a time reduces the secondary effects associated with adult booths. The City Council reasonably relies on prior court decisions on the need for operational standards on the regulation of adult booths including *Mitchell v. Comm. on Adult Entertainment,* 10 F.3d 123, 131-139 (3rd Cir. 1993); *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir. 1999); *City of Colorado Springs v. 2354 Inc.,* 896

P.2d 272 (1995); *Acorn Investments v. City of Seattle,* 887 F.2d 219 (9th Cir. 1989); *Bamon Corp. v. City of Dayton,* 923 F.2d 470 (6th Cir. 1991); *World Wide Video, Inc. v. City of Tukwila,* 816 P.2d 18 (1991). In addition, the provisions pertaining to adult booths are necessary to eliminate the masturbation and sexual activity that are known to occur in adult booths and which present significant health and safety concerns with respect to communicable diseases, including AIDS. The City Council takes further note of the Ninth Circuit's decision in *Ellwest Stereo Theater, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982) and its finding that there is no constitutional right to unobserved masturbation in a public place. The City Council further finds that operational standards for adult booths are even more critical in the existing scenario, which reduces the buffer zone between the performer and patron during offstage performances.

R. It is not the intent of the City Council of the City of La Habra in enacting this Ordinance or any provision thereof to condone or legitimize the distribution of obscene material, and the City and its Council recognize that State law prohibits the distribution of obscene materials and expect and encourage law enforcement officials to enforce State obscenity statutes against such illegal activities in La Habra.

S. The City Council does not intend to regulate in any area preempted by California law, including but not limited to, regulation of obscene speech, nor is it the intent of the City Council to preempt regulations of the State Department of Alcoholic Beverage Control ("ABC").

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T. Nothing in this Ordinance is intended to authorize, legalize, or permit the establishment, operation, or maintenance of any business, building, or use which violates any City ordinance or any statute of the State of California regarding public nuisances, unlawful or indecent exposure, sexual conduct, lewdness, obscene or harmful matter, or the exhibition or public display thereof.

U. This Ordinance is further justified by the fact that without these regulations the City will be prohibited from furthering its substantial governmental interest in protecting its residents from the aforementioned pernicious secondary effects caused by the unregulated operation of adult use businesses.

V. This ordinance is necessary for the preservation of the public peace, health and safety, which is justified by the fact that these operating standards need to be in place immediately or the siting of a new adult facility could detrimentally impact the City's ability to protect the public from the pernicious secondary effects of an unregulated operation or under-regulated adult use business(es).

SECTION 2. The definition of performer found in Section 18.60.010 is hereby deleted and replaced with the following:

"Performer" shall mean any person who is an employee or independent contractor of an adult business, and who, with or without any compensation or other form of consideration, performs adult live entertainment for patrons of an adult business. Performer does not include a patron.

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SECTION 3. The definition of "arcade booth" found in Section 18.60.010 is hereby deleted and replaced with the following:

"Adult Booth/Individual Viewing Area" shall mean a partitioned or partially enclosed portion of an adult business used for any of the following purposes:

(A) Where a live or taped performance is presented or viewed, where the performances and/or images displayed or presented are distinguished or characterized by their emphasis on matter depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas";

(B) Where a live or taped performance by an adult cabaret dancer is presented or viewed;

(C) Where adult arcade devices are located.

SECTION 4. The following definition is hereby added to Section 18.60.010:

"Adult Cabaret Dancer" shall mean any person who is an employee or independent contractor of an "adult cabaret" or "adult business" and who, with or without any compensation or other form of consideration, performs as a sexually-oriented dancer, exotic dancer, stripper, go-go dancer or similar dancer whose performance on a regular and substantial basis focuses on or emphasizes the adult cabaret dancer's breasts, genitals, and or buttocks, but does not involve exposure of "specified anatomical areas" or depicting or engaging in "specified sexual activities." Adult cabaret dancer does not include a patron.

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SECTION 5. Sections 18.60.030 and 18.60.040 are hereby repealed and replaced to read as follows:

18.60.030. Regulation of Adult Booth/Individual Viewing Area.

A. No adult booth/individual viewing area shall be occupied by more than one individual at a time. This restriction shall not apply to an adult booth/individual viewing area where the performer or adult cabaret dancer is completely separated from the area in which the performer or adult cabaret dancer is viewed by an individual by a permanent, floor to ceiling, solid barrier. However, in the scenario where a permanent, floor to ceiling, solid barrier is in place, no performers or adult cabaret dancers shall be allowed to perform inside the portion of the adult booth/individual viewing area where the patron is located, nor can the area be occupied by more than one patron.

B. Each adult booth/individual viewing area within the adult business shall be visible from the manager's station(s) in a public portion of the establishment, and shall not be obscured by any door, curtain, wall, two-way mirror or other device which would prohibit a person from seeing the interior of the adult booth/individual viewing area from a manager's station or stations located in the public portion of the establishment. A manager shall be stationed in each of the manager's station or stations at all times the business is in operation or open to the public.

C. No doors are permitted on an adult booth/individual viewing area.

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D. No holes or other openings shall be permitted between adult booths/individual viewing areas. Any such hole or opening shall be repaired within 24 hours using "pop" rivets to secure metal plates over the hole or opening to prevent patrons from removing the metal plates.

E. No beds shall be permitted in an adult booth/individual viewing area.

18.60:040. Intentionally left blank.

SECTION 6. Section 18.60.080 A and B are hereby deleted and replaced to read as follows:

A. It is unlawful for any operator of an adult business to allow such adult business to remain open for business, or to permit any performer or adult cabaret dancer to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of two a.m. and ten a.m. of any particular day.

B. It is unlawful for any performer or adult cabaret dancer, of an adult business to engage in a performance, solicit a performance, make a sale, solicit a sale, provide a service, or solicit a service, between the hours of two a.m. and ten a.m. of any particular day.

SECTION 7. Section 18.60.090 is hereby repealed and replaced as follows:

18.60.090. Adult Business Offering Adult Live Entertainment B Operating Requirements.

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No person, association, partnership or corporation shall engage in, conduct or carry on, or permit to be engaged in, conducted or carried on the operation of an adult business which offers adult live entertainment unless each and all of the following requirements are met:

A. It is unlawful for any employee, owner, operator, responsible managing employee, manager or permittee of an adult business which offers adult live entertainment to allow any person below the age of eighteen years upon the premises or within the confines of any adult business which offers adult live entertainment if no liquor is served, or under the age of twenty-one if liquor is served.

B. Intentionally omitted.

C. Intentionally omitted.

D. All employees of adult businesses which offer adult live entertainment, other than performers while performing on the permanently fixed stage, shall, at a minimum while on or about the licensed premises, wear an opaque covering which covers their specified anatomical areas.

E. All adult live entertainment shall occur on a permanently fixed stage which is at least eighteen inches (18") above the level of the floor, and surrounded with a three foot (3') high barrier or by a fixed rail at least thirty inches (30") in height. A distance of at least four feet (4'), measured horizontally, shall be maintained between patrons and on stage performers at all times during which said performer(s) are revealing specified anatomical areas and/or depicting or engaging in

specified sexual activities. No on stage performer or on stage adult cabaret dancer shall have physical contact with any patron, and no patron shall have physical contact with any on stage performer or on stage adult cabaret dancer.

F. As to off stage performances, no performer shall perform adult live entertainment characterized by the exposure of specified anatomical areas or engaging in specified sexual activities off stage. As to an adult cabaret dancer then performing off stage, a distance of at least two feet (2') shall be maintained between the adult cabaret dancer and patron(s) at all times. As to off stage performances, no adult cabaret dancer shall have physical contact with any patron and no patron shall have physical contact with any adult cabaret dancer, while the adult cabaret dancer is performing on the premises. This prohibition does not extend to incidental touching.

G. In addition, while on the premises, no performer or adult cabaret dancer shall have physical contact with a patron and no patron shall have physical contact with a performer or adult cabaret dancer, which physical contact involves the touching of the clothed or unclothed genitals, pubic area, buttocks, cleft of the buttocks, perineum, anal region, or female breast with any part or area of any other person's body either before or after any live entertainment by such performer or adult cabaret dancer. Patrons shall be advised of the no-touching requirements by signs and, if necessary, by employees, performers or adult cabaret dancers of the establishment.

H. If patrons wish to pay or tip performers or adult cabaret dancers, payment or tips may be placed in receptacles. Patrons shall not throw monies to performers or adult cabaret dancers, hand monies directly to performers or adult cabaret dancers, place monies in the performers' or adult cabaret dancers' costumes or otherwise throw monies on the stage. Patrons shall be advised of these tipping and gratuity requirements by signs conspicuously placed on the premises. If necessary, patrons shall also be advised of the tipping and gratuity requirements by employees or independent contractors of the adult business.

I. The adult use business shall provide an entrance/exit to the premises for entertainers which is separate from the entrance/exit used by patrons.

SECTION 8. Section 18.60.160 is hereby repealed and replaced as follows:

18.60.160 Permit – Judicial review of decision to grant or deny.

A. The time for a court challenge to a decision of the City Council is governed by California Code of Civil Procedure § 1094.8.

B. Notice of the City Council's decision and its findings shall include citation to California Code of Civil Procedure § 1094.8.

C. Any .permit applicant whose permit has been denied or conditionally approved, to which such conditions the

applicant objects, pursuant to this chapter shall be afforded prompt judicial review of that decision as provided by California Code of Civil Procedure § 1094.8. The City shall make every effort to expedite such review.

SECTION 9. Section 18.60.200 L and M are hereby deleted and replaced as follows:

L. The time for a court challenge to a decision of the City Council is governed by California Code of Civil Procedure § 1094.8.

M. Notice of the City Council's decision and its findings shall be mailed to the applicant and shall include citation to California Code of Civil Procedure § 1094.8.

SECTION 10. Section 18.60.210 E is hereby deleted and replaced as follows:

J. Judicial Review of Decision to Grant or Deny.

1. The time for a court challenge to a decision of the City Council is governed by California Code of Civil Procedure § 1094.8.

2. Notice of the City Council's decision and its findings shall be mailed to the applicant and shall include citation to California Code of Civil Procedure § 1094.8.

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SECTION 11. Section 18.60.240 is hereby repealed and replaced as follows:

Section 18.60.240 Violations — Penalties.

A. Any owner, permit holder, operator, manager, employee or independent contractor of an adult business violating or permitting, counseling, or assisting the violation of any of these provisions regulating adult businesses shall be subject to any and all civil remedies, including permit revocation. All remedies provided herein shall be cumulative and not exclusive. Any violation of these provisions shall constitute a separate violation for each and every day during which such violation is committed or continued.

B. The restrictions imposed pursuant to this chapter are part of a regulatory licensing process, and do not constitute a criminal offense. Notwithstanding any other provision of the La Habra Municipal Code, the City does not impose a criminal penalty for violations of the provisions of this chapter related to sexual conduct or activities.

The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same to be published in the manner required by law. This Ordinance shall become effective thirty (30) days from and after its passage.

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PASSED, APPROVED AND ADOPTED this 7th day of April 2003.

s/ Juan M. Garcia
JUAN M. GARCIA, MAYOR

ATTEST:

s/ Sharie L. Apodaca
SHARIE L. APODACA, CITY CLERK